## Supreme Court of the Anited States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION AND HONORABLE DAMON J. KETTH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PRITTION FOR CERTIDRARI FILED MAY 8, 1971 CHRITORARI GRANTED JUNE 18, 1971

## Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA.

Petitioner,

United States District Court for the Eastern
District of Michigan, Southern Division
AND Honorable Damon J. Keith

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 71-1105

6452

UNITED STATES OF AMERICA, PETITIONER

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UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, AND HONORABLE DAMON J. KEITH, RESPONDENT

(Writ of Mandamus)

Appeal from Eastern District of Michigan, S. D. at Detroit

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Judge Below: KEITH

Government Appeal

For American Civil Liberties Union, Amicus Curiae:
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Sealed Envelope containing Exhibit U. S. v. Sinclair, et al.

Given to Judge Phillips 02/9/71 Called for Appendix E & F 2/10/71

#### GENERAL DOCKET

#### DATE

#### FILINGS PROCEEDINGS

1971

- Feb. 5 Four opies of Petition for Writ of Mandamus with exhibits and appendix
  - 8 Order staying order of District Court entered January 25, 1971, pending disposition of petition for writ of mandamus, and setting the petition for oral argument on February 15, 1971 at 2 P.M. (Phillips, Weick and Edwards, JJ.)
  - Motion of American Civil Liberties Union to file brief as Amicus Curiae and to present oral argument (Leave granted to file brief as Amicus Curine; motion to present oral argument denied—HP)
  - 15 Four copies of Memorandum on behalf of American Civil Liberties Union and A.C.L.U. of Michigan, as Amicus Curiae (Copies distributed to the Court)
  - 15 Four copies of Respondents' motion to dismiss petition for writ of mandamus and supporting memorandum
  - 15 Cause argued and submitted (Before: Phillips, Weick and Edwards, JJ.)
    - 23 Four copies of Supplemental Memorandum for Petitioner (Copies distributed to the Court)
  - 23 Proof of service of supplemental memorandum for Petitioner
  - 24 Four copies of Supplemental Brief for Respondents, the American Civil Liberties Union and the American Civil Liberties Union of Michigan, Amici Curiae (Copies distributed to the Court)

#### GENERAL DOCKET

#### FILINGS-PROCEEDINGS DATE

1971

Feb. 26 Four copies of letter from counsel for Respondents, supplementing their brief filed February 24 (Copies distributed to the Court)

8 Order denying petition for writ of mandamus Opinion by Edwards, J. (Weick, J., dissenting)

Motion of Petitioner for a stay of the mandate

Opposition of Respondents to motion for stay of May mandate

Order granting motion of Appellant to stay the mandate to and including May 29, 1971 (Edwards, S-5 J.)

Ruling on motion included with Defendants' motion of May 5, 1971 in opposition to stay of mandate: Motion for bond on recognizance is denied without prejudice to application before the District Court-Edwards, L

9 Certified copy of order granting petition for certio-July rari by the U.S. Supreme Court 6/21/71 (SC No. 1687, Oct. Term, 1970) (70-1)

12 Letter from Office of Clerk of Supreme Court requesting that the record be transmitted to the Supreme Court

#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Indictment No. 44375

Vio? 18 USC 371 and 1361

(Conspiracy; Destruction of Government Property)

UNITED STATES OF AMERICA, PLAINTIFF

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JOHN SINCLAIR, LAWRENCE ROBERT "PUN" PLAMONDON, and JOHN WATERHOUSE FORREST, DEFENDANTS

INDICTMENT

#### COUNT ONE:

#### THE GRAND JURY CHARGES:

1. That commencing on or about September 1, 1968 and continuously thereafter up to and including November 1, 1968 in the Eastern District of Michigan JOHN SINCLAIR, LAWRENCE ROBERT "PUN" PLAMONDON, and JOHN WATERHOUSE FORREST, the defendants herein, and DAVID JOSEPH VALLER, named herein as a co-conspirator but not as a defendant, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with diverse other persons whose names to the Grand Jury are unknown, to commit an offense against the United States, that is, to wilfully and knowingly and by means of dynamite to injure property of the United States thereby causing damage in excess of \$100.00; in violation of Section 1361, Title 18, United States Code.

2. It was a part of the said conspiracy that the said defendants and co-conspirators would bomb the offices of the Central Intelligence Agency, 450 S. Main Street, Ann

Arbor, Michigan, thereby causing damage in excess of \$100.00 to property of the United States.

#### OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about September 7, 1968, the exact date to the Grand Jury being unknown, at Detroit, in the Eastern District of Michigan, JOHN SINCLAIR and DAVID JOSEPH VALLER held a conversation at the First Unitarian Universalist Church, 4605 Cass Avenue, Detroit, Michigan.

2. On or about September 14, 1968, the exact date to the Grand Jury being unknown, at Detroit, in the Eastern District of Michigan, LAWRENCE ROBERT "PUN" PLAMONDON and DAVID JOSEPH VALLER had a meeting at the Detroit offices of the "Fifth Estate", 1107

West Warren, Detroit, Michigan.

3. On or about September 24, 1968, the exact date to the Grand Jury being unknown, at Detroit, in the Eastern District of Michigan, JOHN WATERHOUSE FORREST and DAVID JOSEPH VALLER supplied a quantity of dynamite to LAWRENCE ROBERT "PUN" PLAMONDON.

4. On or about September 29, 1968 at Ann Arbor, in the Eastern District of Michigan, LAWRENCE 'ROBERT "PUN" PLAMONDON placed and caused the placing of a quantity of dynamite outside the offices of the Central Intelligence Agency, 450 S. Main Street, Ann Arbor, Michigan.

5. On or about October 6, 1968 at Ann Arbor, in the Eastern District of Michigan, LAWRENCE ROBERT "PUN" PLAMONDON and DAVID JOSEPH VALLER held a conversation at 1510 Hill Street, Ann Arbor, Michigan.

In violation of Section 371, Title 18, United States

Code.

#### COUNT TWO:

### THE GRAND JURY FURTHER CHARGES:

On or about September 29, 1968 at Ann Arbor, in the Eastern District of Michigan, LAWRENCE ROBERT "PUN" PLAMONDON, defendant herein, wilfully and by means of dynamite, did injure, and cause to be injured, property of the United States, that is, office equipment, furniture, and supplies, thereby causing damage in excess of \$100.00; in violation of Section 1361, Title 18, United States Code.

This is a True Bill.



Foreman

ROBERT J. GRACE United States Attorney

Dated:

#### EXHIBIT A

#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Indictment No. 44375

Oral Argument Requested

UNITED STATES OF AMERICA, PLAINTIFF

28

JOHN SINCLAIR, LAWRENCE ROBERT "PUN" PLAMONDON, and JOHN WATERHOUSE FORREST, DEFENDANTS

MOTION FOR DISCLOSURE OF ELECTRONIC OR OTHER SUR-VEILLANCE, FOR A PRETRIAL HEARING, TO SUPPRESS EVIDENCE AND TO DISMISS THE INDICTMENT

Defendants, by their undersigned counsel, respectfully move this Court, pursuant to Federal Rules of Criminal Procedure 16 and 41 and the Fourth, Fifth and Sixth Amendments to the United States Constitution for an order compelling the United States to disclose to defend ants: (1) any and all logs, records, and memoranda of any electronic or other surveillance directed at any of the defendants herein or at unindicted co-conspirators herein, or conducted at or upon or directed at premises of any defendant or unindicted co-conspirator herein; (2) the name and business address of any person who had conducted surveillance falling within the request made in (1), which surveillance was not the subject of any log, record or memorandum. These requests seek not only surveillance which is known to the government but that which in the exercise of due diligence may become known thereto, as well as surveillance conducted by any agency of government, local, state or federal. Moreover, defendants seek the disclosure of any and all electronic or other surveillance (a) conducted under the Omnibus Crime Control Bill, P.L. 90-351 (June 19, 1968), (b) regarded by the government as lawful under its so-called "National Security" and "internal subversion" exceptions to the Fourth Amendment, and (c) of any conversation between any defendant and/or co-conspirator and any attorney for any defendant or any person employed thereby, or of any conversations involving said attorneys or persons employed by them. In addition, they seek continuing disclosure under Federal Rule of Criminal Procedure 16(g) and any applicable local rule or rules.

Defendants further move for an evidentiary hearing prior to trial to determine whether the government has turned over all records of electronic surveillance and the extent to which the surveillance disclosed tainted the evidence upon which the indictment is based and which

the government intends to use at trial.

Defendants further move that, in the event the hearing requested in the foregoing paragraph should disclose that the indictment herein was obtained, or the investigation of the defendants or some of them commenced, in reliance upon illegally-obtained evidence, the indictment be dismissed.

The grounds for this motion, as more particularly set forth in the accompanying memorandum of points and authorities and affidavit of counsel, are that only through effective pretrial adversary inquiry can the defendants be protected in their right to be free of the effects of unlawful electronic or other surveillance.

Respectfully submitted,

Hugh Davis 60 Harper Street Detroit, Michigan (313)

WILLIAM M. KUNSTLER Center for Constitutional Rights 588 Ninth Avenue New York, New York 10036 (212) 265-2500

LEONARD I. WEINGLASS 43 Bleeker Street Newark, N. J. (201) 622-4545

By: /s/ William M. Kunstler On behalf of all counsel

Of Counsel:

Marc Stickgold, Esq. 726 Pallister Ave. Detroit, Michigan

Justin C. Ravitz 2761 E. Jefferson St. Detroit, Michigan

October 5, 1970

#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Indictment No. 44375

UNITED STATES OF AMERICA, PLAINTIFF

28.

John Sinclair, Lawrence Robert "Pun" Plamondon, and John Waterhouse Forrest, Defendants

AFFIDAVIT OF WILLIAM M. KUNSTLER IN SUPPORT OF MOTION RE ELECTRONIC AND OTHER SURVEILLANCE

STATE OF NEW YORK )

COUNTY OF NEW YORK )

WILLIAM M. KUNSTLER, being duly sworn, deposes and says:

1. I am one of the attorneys for defendants herein and I am submitting this affidavit in support of their motion for disclosure of electronic and other surveillance, to suppress evidence and dismiss the indictment.

2. From my own knowledge, I am familiar with previous efforts of the Government to conceal its sources of illegally obtained evidence. In *United States* v. Baker, No. 39-66, D.C.D.C., an extensive examination of Special Agent Paul Kenneth Brown of the Federal Bureau of Investigation was conducted by Michael E. Tigar, one of defendant's attorneys, on April 16, 1969. From October 3, 1963 until January, 1966, Agent Brown had been assigned as case agent to the Baker investigation in the Washington Field Office of the FBI. The subject of this examination was certain material in Agent Brown's file which was obtained from illegal electronic surveillance of premises occupied by the defendant Baker in the Sheraton-Carlton Hotel in Washington, D.C.

Agent Brown had been directed by the district judge in the Baker case after a prior hearing in December, 1968 to search the Baker case file to see if it contained any fruits of the Sheraton-Carlton surveillance dealing with the defendant's vending machine business. Agent Brown reported that he found two such items. The first such item was a direct copy from an entry in the field office file on Fred B. Black, Jr., and carried a file number, serial number and page number indicating its source. It also carried a cody symbol with the notation "C\*", indicating that the information came from an illegal

microphone surveillance.

As to the other such item, however, Agent Brown reported that it contained no symbol identifying it as originating in an illegal microphone surveillance. Agent Brown had to look at another file, not the Baker file, to determine the origin of the second item. Therefore, although he was Baker case agent for more than two years (1963-1966), he did not know until December, 1968 that this item emanated from an illegal source. Agent Brown's search was conducted by subject matter, so that when he came upon material relating to vending machines, he would look at other files to determine its source. In order to determine the source of other material in the file, he would, I am informed and believe, have to search not only the file of the particular person whose file was being examined, but an undetermined number of other files.

3. I am informed and believe that FBI files are kept by name of the person being investigated, and that there is extensive cross-referencing and exchange of information between files. It is routine for an "indices check" to be conducted when a new case file is opened on a particular person, to determine whether any information on that person already exists in other FBI files; Agent

Brown so testified on April 16, 1969.

4. In the hearing on discovery of illegal surveillance in *United States* v. *Fred B. Black, Jr.*, Crim. Nos. 551-63 and 650-63 (D.D.C.), oral examination of FBI agents was used as a means of determining that all material to which the defendant was entitled was turned over. During this hearing, FBI Agent Benjamin testified that

he would not always be able to determine, from examination of an entry in an FBI file, whether the information had a legal or illegal source, because information from an illegal microphone surveillance might be couched in such terms as "a confidential informant advised," fol-

lowed by the illegally-obtained information.

5. In McGarry, the trial court heard the testimony of one Owen Burke Yung, an employee of the Internal Revenue Service responsible for coordination of certain Organized Crime investigations. Yung's practice was to authorize installation of illegal wiretaps and to have the tapes made over such tapes sent to him. He would sit alone in his office and listen to the tapes, then erase them. He would telephone his agents in the field and tell them to follow up particular points, without revealing where he obtained the information which was the basis of his suggestion. Disclosure of Yung's activity by the government is based upon his memory of "thousands of voices."

6. In United States v. Dellinger, et al., 69 Cr. 180 D.N.D. Ill., the government, in response to a motion similar to the instant one, initially revealed that it had conducted electronic or other surveillance of five of the defendants therein. After the trial had begun, it revealed further such surveillances involving the same and other defendants in that case.

7. All statements in this affidavit are made on information and belief, except where otherwise set forth.

#### /s/ William M. Kunstler WILLIAM M. KUNSTLER

Subscribed and sworn to before me this 5th day of October, 1970.

/s/ Nancy Stearns
NANCY STEARNS
Notary Public, State of New York
No. 31-3818800
Qualified in New York County
Commission Expires March 30, 1972

#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

No. 44375

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN SINCLAIR, LAWRENCE ROBERT "PUN" PLAMONDON, and JOHN WATERHOUSE FORREST, DEFENDANTS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DISCLOSURE OF ELECTRONIC OR OTHER SURVEILLANCE, FOR A PRETRIAL HEARING, TO SUPPRESS EVIDENCE AND TO DISMISS THE INDICTMENT

## I. Disclosure of Illegal Electronic and Other Surveillance

Disclosure of illegal surveillance to its victims, without regard to its purported "relevance", and without regard to its potential impact upon other governmental concerns such as the national security, is now the law of the land." Alderman v. United States, 394 U.S. 165 (1969). The government must now disclose, to a defendant in a federal criminal case all illegal electronic surveillance, and the fruits thereof, which he would have standing to suppress. A defendant's standing to suppress evidence, the Court held, rests upon two bases. First, a defendant has standing to object to any unconsented surveillance in which his own voice is monitored. This aspect of the standing rule takes account of the holding in Katz v. United States, 389 U.S. 347 (1967), that what a man seeks to preserve as a private communication, even in an area accessible to the public, is protected by the Fourth Amendment.

Second, a defendant has standing to suppress all evidence gathered in the course of any surveillance of prem-

<sup>\*</sup> See disclosure provisions of Omnibus Crime Bill, P.L. 90-351 (June 19, 1968), 18 U.S.C. 2518 [10] [a]: Cf. Berger V. New York, 388 U.S. 41 (1967).

ises as to which he has "standing" in the traditional sense discussed in Jones v. United States, 362 U.S. 257 (1960: Such places are protected from unreasonable search by the Fourth Amendment. This protection extends not only to premises in which a defendant has a proprietary interest, such as his home or apartment, see Jones v. United States, supra, premises on which he is a visitor or to which he has regular access as a guest, Jones v. United States, supra, United States v. Paroutian, 299 F.2d 486 (2nd Cir. 1962); Baker v. United States, 401 F.2d 958 (D. C. Cir. 1968), space, as in an office, which is assigned for his temporary use, United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951), see also Mancusi v. deForte, 392 U.S. 364 (1968), and even such areas as a jail cell under particular circumstances, see Lanza v. New York, 370 U.S. 139' (1962). See also Simmons v. United States, 390 U.S. 377 (1968); Bumper v. North Carolina, 391 U.S. 543 (1968), for indications of the extent to which the Court has been willing to extend the law of standing from its original definition as grounded on "property rights" to the present view that expectations of privacy are the governing principle.

The scope and meaning of the duty imposed by Alderman derives content from the discovery provisions of the Federal Rules of Criminal Procedure. The government must turn over all the fruits of illegality which the exercise of "due diligence" would disclose to the trained investigator. F. R. Crim. P. 16 (a). See Advisory Committee Notes, 39 F.R.D. at 175-76, and particularly the case there cited, People v. Cartier, 51 Cal. 2d 590, 335 P.2d 114 (1959). The demand for continuing a disclo-

<sup>&</sup>quot;The 'due diligence' requirement is designed to require the government to make a thorough search of all files of all agencies which may have engaged in electronic surveillance. Such agencies have included it has been revealed in other cases in which counsel has appeared, the Federal Bureau of Investigation, the Internal Revenue Service (and, more broadly, the Treasury Department), various police agencies in New York State, the New Orleans Sheriff's Office, and others". Memorandum of Points and Authorities, In Support of Motion for Disclosure of Electronic Surveillance, United States v. Masshall, et dt., No. 51942, D. W.D. Wash. 1970.

sure is predicated upon F. R. Crim. P. 16 (g). The heavy burden which the government must bear in searching for illegality in its files is attested to by the annexed affidavit of counsel, which demonstrates the lengths to which government agents have gone to conceal the sources of illegally-obtained evidence. Government counsel, it is suggested, should file an affidavit setting out the extent of their search, and the manner in which it was conducted. This affidavit must then be the subject of a hearing if it appears that adversary inquiry is necessary to resolve the question whether all illegally-obtained material has been turned over. Such a hearing was ordered in *United States* v. *Black*, Crim. Nos. 551-63 and 650-63 (D.D.C.).

The request for material not reduced to writing is based upon previous experience, set out in the annexed affidavit, that the government has in many cases destroyed all records of particular surveillances after using the illegally obtained information for leads to further evidence.

The request for material from state and local law enforcement agencies is predicated upon the Supreme Court's abolition, in Elkins v. United States, 364 U.S. 206 (1960), of the "silver platter" doctrine, and the plain fact that in a number of cases federal and state and local law enforcement officers and known to exchange information with one another. See United States v. Brown, No. 30966, D.E.D. La., 1970, where the government disclosed that the defendant's conversations while a federal prisoner in a parish jail had been overheard by a state official and then revealed to federal authorities. - Moreover, at least one of these conversations was between Brown and his attorney in violation of Black v. United States, 385 U.S. 26 (1966) and O'Brien v. United States, 386 U.S. 345 (1967). Cf. Hoffa v. United States. 387 U.S. 231 (1966).

Defendants concede that the request for the fruits of illegal surveillance directed at coconspirators presents for consideration a matter resolved unfavorably to the defendants' contention in *Alderman*. However, it seems

decidedly unfair to permit the government to take advantage of the "partnership in crime" theory of the conspiracy law without suffering at the same time the consequence that illegal surveillance of unindicted alleged conspirators. This discussion is entirely aside from that of the Supreme Court's liberal interpretation of the term "directed against" as defining the limits on standing to suppress illegally-obtained evidence. The Court, as recently as Mancust v. DeForte, 392 U.S. 364 (1968), has squarely held that where a search is directed at a defendant, though it involves a technical trespass only against another, the defendant has standing to object to Thus, in Mancusi, the records of a union local were suppressed at the instance of a union official who had no proprietary interest in them, on the ground that the official was the man the agents were "out to get". So here, it may require extensive inquiry to determine even the threshhold question of standing.

Finally, the form of the certification which the government must make in fulfilling its obligations under .. Alderman remains to be considered. Essentially, the government, when making an Alderman certification, is saying that a thorough search of all its files discloses no illegal electronic surveillance other than that disclosed. This assertion is essentially an evidential use of the absence of an entry in a public record to show that an event or events did not take place. This use of public records is regularly made under Fed. R. Crim. P. 44(b), made applicable to criminal cases under Fed. R. Crim. P. 27. Of course, since such proof is evidentiary only, and not conclusive, the defendants may elect to challenge it by means of other evidence. The point for present purposes is clear: the government, in making its Alderman showing, must do so in a way which shows minimal respect for the rules of evidence, including the use of proper affidavits which satisfy Fed. R. Civ. P. 44(b).

## II. The Request for a Hearing

The defendants request for a hearing rests upon the opinion of Judge Jones in United States v. Black, supra,

and upon the holding in Battle v. United States, 345 F.2d 438 (D.C. Cir. 1965), that Rule 41(e) requires motions to suppress to be heard prior to trial.\* The Battle rule reflects a consistent federal policy which knows only the exception which arises when a defendant learns for the first time at trial that evidence sought to be used against him was obtained illegally. See Comment, 54 Calif. L. Rev. 1070, 1082-83 (1966). It is particularly appropriate to invoke the rule in this case. If the government's evidence is tainted, the indictment may have to be dismissed, saving the defense the expense, emotional strain and time of a lengthy trial.

### III. Dismissal or Suppression?

Without question, evidence obtained in violation of Fourth Amendment rights must be suppressed. Nardone v. United States, 308 U.S. 338 (1939). But Nardone also raised another possibility: that the government's entire case may be the fruit of the poisonous tree and therefore subject to dismissal. In United States v. Schipani, 290 F.Supp. 43 (E.D.N.Y. 1968), Judge Weinstein explored this question in detail and at length. He concluded that when the indictment in a case was obtained substantial reliance upon illegally-obtained evidence, the indictment must be dismissed.\*\* He further held that if a decision to focus upon a particular suspect was made in substantial reliance upon illegal surveillances which by their nature require dismissal of an indictment thereafter obtained or which if conducted during the course of a criminal case require dismissal of the pending proceeding. We respectfully suggest that surveillances of this type must necessarily include those which trespass upon lawyer-client communications.

<sup>\*</sup> See generally Alderman v. United States, supra, Wong Sun v. United States, 375 U.S. 471 (1963).

<sup>\*\*</sup> See also United States v. Dote, 371 F.2d 176 (7th Cir. 1966); United States v. Guglielmo, 245 F.Supp. 534 (N.D. Ill., 1965).

#### Conclusion

Defendants cannot know the extent of illegal surveillance, but suggest that adversary inquiry, Alderman v. United States, supra, is required from this point forward as a means of resolving this question. Further requests for documents and for production of witnesses, and for relief from the effects of illegality, must await the government's response to this motion. Defendants respectfully request that the relief requested in this motion be granted.

Respectfully submitted,

Hugh Davis 60 Harper Street Detroit, Michigan (313) 871-1251

WILLIAM M. KUNSTLER
Center for Constitutional Rights
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(212) 265-2500

LEONARD I. WEINGLASS 43 Bleeker Street Newark, New Jersey (201), 622-4545

By: /s/ William M. Kunstler On behalf of all counsel

#### Of Counsel:

Marc Stockgold, Esq. 726 Pallister Ave. Detroit, Michigan

Justin Ravitz 2761 East Jefferson St. Detroit, Michigan

October 5, 1970

#### IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Indictment No. 44375

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN SINCLAIR, LAWRENCE ROBERT "PUN" PLAMONDON, and JOHN WATERHOUSE FORREST, DEFENDANTS

#### AFFIDAVIT

JOHN N. MITCHELL being duly sworn deposes and says:

1. I am the Attorney General of the United States.

2. This affidavit is submitted in connection with the Government's opposition to the disclosure to the defendant Plamondon of information concerning the overhearing of his conversations which occurred during the course of electronic surveillances which the Government contends were legal.

3. The defendant Plamondon has participated in conversations which were overheard by Government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government. The records of the Department of Justice reflect the installation of these wiretaps had been expressly approved by the Attorney General.

4. Submitted with this affidavit is a sealed exhibit containing the records of the intercepted conversations, a description of the premises that were the subjects of surveillances, and copies of the memoranda reflecting the Attorney General's express approval of the installation

of the surveillances.

5. I certify that it would prejudice the national interest to disclose the particular facts concerning these

surveillances other than to the court in camera. Accordingly, the sealed exhibit referred to herein is being submitted solely for the court's in camera inspection and a copy of the sealed exhibit is not being furnished to the defendants. I would request the court, at the conclusion of its hearing on this matter, to place the sealed exhibit in a sealed envelope and return it to the Department of Justice where it will be retained under seal so that it may be submitted to any appellate court that may review this matter.

JOHN N. MITCHELL Attorney General of the United States

Subscribed and sworn to before me on this \_\_\_\_ day

Notary Public .



#### UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

CRIMINAL No. 44375

UNITED STATES OF AMERICA, PLAINTIFF

V.

JOHN SINCLAIR,
LAWRENCE ROBERT "PUN" PLAMONDON,
JOHN WATERHOUSE FORREST, DEFENDANTS

Memorandum Opinion and Order Granting Defendants' Motion for Disclosure of Electronic or Other Surveillance

After the return of the indictment in the present case, but before the commencement of trial, counsels for the defendants filed a motion for disclosure of electronic surveillance in accordance with the United States Supreme Court's holding in Alderman v. United States, 394 U.S. 165 (1969). In essence the motion requests an order from the Court directing the Government to divulge to defendants all logs, records, and memoranda of electronic surveillance directed at any of the defendants or unindicted co-conspirators, and it further requests that a hearing be held to determine whether any of the evidence upon which the indictment is based or which the Government intends to introduce at trial was tainted by such surveillance. In response to this motion the Government submitted

an answer which stated that at that time the Government had no knowledge of any electronic surveillance pertaining to any of the defendants but that a further inquiry was then being conducted with the Federal Bureau of Investigation. In its answer the Government stated that the United States Attorney's Office would advise the Court if and when any evidence of electronic monitoring was discovered, and in such event, would file a reply to the defendant's motion to disclose.

Subsequently, the Court received an affidavit signed by the United States Attorney General, John N. Mitchell, stating that he had authorized and deemed necessary the wiretapping of certain of defendant Plamondon's conversations. Sealed records and files were submitted with this affidavit for the review and inspection of the Court in camera. Also accompanying these materials was a motion to dismiss the defendant's request for disclosure of the surveillance evidence and a brief in support of said motion. In both the affidavit and the above stated brief the Attorney General has certified that public disclosure of the particular facts concerning this surveillance would prejudice the national interest, and, therefore, it has been requested that the Government be notified prior to any decision regarding disclosure so that it can determine how it will proceed with the case. Defendants have submitted reply briefs maintaining their position that this electronic evidence must be submitted to them for their investigation. Oral argument was heard regarding this issue on January 14th and 16th, 1971.

In Alderman v. United States, supra, the Supreme Court held that the Government must disclose and make available to a defendant who has the proper standing, any conversations he participated in or that

occurred on his premises which the Government overheard during the course of any illegal electronic surveillance. The clear purpose of this ruling is to reinforce the long standing exclusionary rule of the Fourth Amendment by preventing the Government from building its case upon evidence which is obtained by unconstitutional methods. In the instant case, since defendant Planondon was a party to the monitored conversation, he has the requisite standing to object to the evidence and to raise a motion for disclosure. 394 U.S. at 176. It thus becomes necessary to determine whether the surveillance involved herein was lawful, i.e., in violation of the defendant's Fourth Amendment rights. For the law has evolved that disclosure is necessary only when the District Court determines that the surveillance was conducted illegally. Concurring Opinion of Mr. Justice White in Giordano v. United States, 394 U.S. 310 (1968).

The position of the Government in this matter, simply stated, is that the electronic monitoring of defendant Plamondon's conversations was lawful in spite of the fact that the surveillance was initiated and conducted without a judicial warrant. In support of this position, the Government contends that the United States Attorney General, as agent of the President, has the constitutional power to authorize electronic surveillance without a court warrant in the interest of national security. The validity of the Government's position on this issue, under the Fourth Amendment, has not yet been decided by the Supreme Court. See Footnote 23 in Katz v. United States, 389 U.S. 347, 358. There have been, however, a small number of District Court cases which concern themselves with this issue. In presenting its oral argument the Government relies heavily upon United States vs.

Felix Lindsey O'Neal, Criminal No. KC-CR-1204 (D. C. Kan., September 1, 1970), a case in which the District Judge made an in-court ruling that surveillance pursuant to the authorization of the Attorney General was lawful. See, also, United States of America vs. Dellinger, Criminal No. CR 69-180 (N.D. Ill., February 20, 1970); United States v. Clay, No. 783,

O.T. (5th Cir., July 6, 1970) cert. pending.

Particularly noteworthy, and the basis of defendant's oral argument in support of his motion for disclosure, is the exceptionally well-reasoned and thorough opinion of the Honorable Judge Warren Ferguson of the Central District of California. U.S. v. Smith, Criminal No. 4277-CD (C.D. Cal., January 8, 1971). The affidavit and circumstances which were represented before Judge Ferguson are identical to the affidavit and issues now before this Court for consideration, and the Court is compelled to adopt the rule and rationale of the Smith case in reaching its decision today.

The great umbrella of personal rights protected by the Fourth Amendment has unfolded slowly, but very deliberately, throughout our legal history. The celebrated cases of Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961), became the cornerstone of the amendment's foundation and together these decisions established the precedent that evidence secured in violation of a defendant's Fourth Amendment rights could not be admitted against him at his trial. In Silverthorn Lumber Co. v. United States, 251 U.S. 385 (1920), the familiar legal simile of the "poisonous tree" became the pillar for the Court's ruling that the exclusionary rule of Weeks was to be expanded to prohibit the admission of any fruits derived from illegally seized evidence. The final buttress to this canopy of Fourth

Amendment protection is derived from the Court's declaration that the Fourth Amendment protects a defendant from the evil of the uninvited ear. In Silverman v. United States, 365 U.S. 505 (1961), and Katz v. United States, 389 U.S. at 347, the Court ruled that oral statements, if illegally overheard, and their fruits are also subject to suppression.

In the instant case the Government apparently ignores the overwhelming precedent of these cases and argues that the President, acting through the Attorney General, has the inherent Constitutional power: (1) to authorize without judicial warrant, electronic surveillance in "national security" cases; and (2) to determine unilaterally whether a given situation is a matter within the concept of national security. The Court cannot accept this proposition for we are a country of laws and not of men.

The Government contends that the President can conduct warrantless surveillances under the authority of the Omnibus Crime Control and Safe Streets Act of 1968. The effect of this comprehensive statute is to make unauthorized surveillance a serious crime, and the general rule of the act is that Government surveillance and/or wiretapping is permitted only. upon the showing of probable cause and the issuance of a warrant. An exception to this general rule permits the President to legally authorize electronic surveillance "to obtain foreign intelligence information deemed essential to the security of the United States."

The Act also provides:

Nothing contained in this chapter or in Section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack

or other hostile acts of a foreign power, or to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

In addressing himself to the relevance of this statutory provision to the warrantless surveillance issue. Judge Ferguson of the California District Court stated succinctly that; "Regardless of these exceptions in the criminal statute the President is, of course, still subject to the Constitutional limitations imposed upon him by the constitution. This Court is in full accord with this rationale for it is axiomatic that the Constitution is the Supreme Law of the Land. Marbury v. Madison, 1 Cranch (5 U.S.) 137."

The contention by the Government that in cases involving "national security" a warrantless search is not an illegal one, must be cautiously approached and analyzed. We are, after all, dealing not with the rights of one solitary defendant, but rather, we are here concerned with the possible infringement of a fundamental freedom guaranteed to all American citizens. In the first Supreme Court case involving wiretapping, Justice Brandeis concisely stated the issue at stake in a case of this nature:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment Olmstead v. United States, 277 U.S. 438, 478 (1928).

It is to be remembered that the protective sword which is enshrouded in the scabbard of Fourth Amendment rights and which insures that these fundamental rights will remain inviolate, is the well defined rule of exclusion. And, in turn, the cutting edge of the exclusionary rule is derived from the requirement that the Government obtain a search warrant before it can conduct a lawful search and seizure. It is this procedure of obtaining a warrant that inserts the impartial judgment of the Court between the citizen and the government.

Generally, in order to search a citizen's premises, law enforcement agents must appear before the Court or Magistrate and request a warrant. The request must describe the place to be searched, matter to be seized, and, most importantly there must be a statement made under oath that the Government has probable cause to believe that criminal activity exists. Through this procedure, we as citizens are assured the protection of our constitutional right to be free from unreasonable searches and seizures by the maintenance of a system of checks and balances between the arms of government. Prior to issuance of any search

warrant the Court must independently review the request to search and make an objective determination whether or not probable cause of some criminal activity exists, which activity would make the searching reasonable and not in violation of Fourth Amendment rights. In absence of such a requirement of an objective determination by a magistrate, law enforcement officials would be permitted to make their own evaluation as to the reasonableness, the scope, and the evidence of probable cause for a search. This Court is loath to let such a condition come to exist.

In its brief the Government cites several cases which have held that the President has the authority to authorize electronic surveillance which he deems is necessary to protect the nation against the hostile acts of foreign powers. Using this precedent the Government submits that the President should also have the constitutional power to gather information concerning domestic organizations which seek to attack and subvert the Government by unlawful means. This argument, however, is untenable for although it has long been recognized that the President has unique and plenary powers in the field of foreign relations; Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); in the area of domestic affairs the Government can act only in limited ways. See, Brandenburg v. Ohio 395 U.S. 444 (1969).

The Government also asserts that the President's authority for warrantless monitoring stems from a confidential memorandum written by President Roosevelt in 1940. But if the President is given power to delegate who shall conduct wiretaps, the question arises whether there is any limit on this power. Furthermore, the Smith case, supra, in tracing the history of the Roosevelt directive, establishes that the Presidential power of surveillance is specifically limited

to "exceptional cases"—cases of a non-criminal nature or which concern the country's international security.

An idea which seems to permeate much of the Government's argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes at the very constitutional privileges and immunities that are inherent in United States citizenship. It is to be remembered that in our democracy all men are to receive equal and exact justice regardless of their political beliefs or persuasions. The Executive branch of our Government cannot be given the power or the opportunity to investigate and prosecute criminal violations under two different standards simply because an accused espouses views which are inconsistent with our present form of Government.

In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our existing form of Government. If democracy as we know it, and as our forefathers established it is to stand then "attempts of domestic organizations to attack and subvert the existing structure of the Government" (See affidavit of Attorney General), cannot be, in and of itself, a crime. It becomes criminal only where it can be shown that such activity was accomplished through unlawful means, such as invasion of the rights of others, namely through force or violence.

The affidavit of the Attorney General of the United States makes no assertion that at the time these wiretaps were installed, law enforcement agents had probable cause to believe that criminal activity (e.g., the illegal overthrow of the Government through force or violence) was being plotted. Indeed, if such probable cause did exist, a warrant to search may have proper-

ly been issued.

In the opinion of this Court, the contention of the Attorney General is in error; it is supported neither historically, nor by the language of the Omnibus Crime Act. Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today. This Court adopts the holding of Judge Warren J. Ferguson in U.S. v. Smith, Criminal No. 4277-CD, (C.D. Cal., Jan. 8, 1971), which held that:

. in wholly domestic situations there is no national security exemption from the warrant requirement of the Fourth Amendment. Since there is no reason why the Government could not have complied with this requirement by obtaining the impartial judgment of a court before conducting the electronic surveillance in question here, it was obtained in violation of the Fourth Amendment.

This Court hereby ORDERS that the Government make full disclosure to defendant Plamondon of his monitored conversations. The Court in the exercise of its discretion, further orders that an evidentiary hearing to determine the existence of taint either in the indictment or in the evidence introduced at trial be conducted at the conclusion of the trial of this matter.

DAMON J. KEITH, United States District Judge.

JANUARY 25, 1971.

### UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(No. 71-1105—Decided and Filed April 8, 1971.).

(On Petition FOR WRIT OF MANDAMUS)

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION AND HONORABLE DAMON J. KEITH, RESPONDENT

Before Phillips, Chief Judge, Weick and Edwards, Circuit Judges

EDWARDS, Circuit Judge. At issue in this case is the power of the Attorney General of the United States as agent of the President to authorize wiretapping in internal security matters without judicial sanction.

This case has importance far beyond its facts or the

litigants concerned.

If decided in favor of the government, the citizens of these United States lose the protection of an independent judicial review of the cause and reasonableness of secret recordation by federal law enforcement of thoughts and expressions which had been uttered in privacy. If it is decided in favor of the respondent, it may prejudice an important criminal prosecution. And more important, of course, in all future surveillances undertaken in internal security matters, it may

add at least some dimension of risk of exposure of

federal investigatorial intentions.

The background of this case is the pending trial in the United States District Court for the Eastern District of Michigan in Detroit of three young men for conspiracy to destroy government property in Ann Arbor, Michigan, in violation of 18 U.S.C. § 371 (1964). One of them named Plamondon was also charged with destruction of government property in a value exceeding \$100, in violation of 18 U.S.C. § 1361 (1964). The particular case before us is a petition for writ of mandamus filed originally in this court by the United States to compel the District Judge who is presiding at the Detroit trial to vacate an order directing the United States to "make full disclosure to defendant Plamondon of his monitored conversations."

#### STATEMENT OF FACTS

For purposes of this case, we accept the statement of facts from the petition filed by the United States:

On December 7, 1969, defendants in the court below were indicted by a Federal Grand Jury for destruction of Government property in violation of 18 U.S.C. 1361. In the course of the pre-trial proceedings, defendants filed a motion for disclosure of certain electronic surveillance information. That motion was granted by respondent, and petitioner has been ordered by respondent to disclose the information sought. Respondent's Order is the subject of this petition.

On October 5, 1970, defendants filed a "Motion for Disclosure of Electronic or other Surveillance, For a Pretrial Hearing, To Suppress Evidence and to Dismiss the Indictment."

On December 18, 1970, petitioner filed, in response, an opposition to defendants' motion. By way of an affidavit of the Attorney General

of the United States, John N. Mitchell, which was attached to petitioner's opposition, petitioner acknowledged that one of the defendants, Lawrence Robert "Pun" Plamondon, had participated in conversations which were overheard by government agents. The logs of these surveillances were given to respondent in the form of a sealed exhibit for respondent's in camera inspection only and are available to this Court on those terms as well.

Oral argument was had before respondent on January 16, 1971; on January 25, 1971, respondent, holding that the surveillance was illegal, granted defendants' motion and ordered petitioner to disclose the information sought. Respondent then granted petitioner a 48-hour stay which was, in turn, extended to and including February 9, 1971, to afford petitioner an opportunity to present this matter to this

To this statement of facts the United States also attached the affidavit of Attorney General Mitchell—the full context of which follows:

Court.

"JOHN N. MITCHELL being duly sworn de-

poses and says:

"1. I am the Attorney General of the United States.

<sup>&</sup>quot;It is important to note at this point that although he was overheard, defendant Plamondon was not the object of the surveillance. This distinction apparently went unnoticed by respondent for he stated in his decision ordering disclosure that the Attorney General had authorized and deemed necessary the wire tapping of certain of defendant Plamondon's conversations."

<sup>&</sup>quot;The sealed exhibit submitted to the court below will quickly demonstrate that defendant Plamondon was not the object of the surveillance, and petitioner respectfully refers this Court's attention to that exhibit and the additional sealed exhibit being made available to the Court for the grounds and objectives of the Attorney General's authorization." (Footnote in quotation.)

"2. This affidavit is submitted in connection with the Government's opposition to the disclosure to the defendant Plamondon of information concerning the overhearing of his conversations which occurred during the course of electronic surveillances which the Government

contends were legal.

"3. The defendant Plamondon has participated in conversations which were overheard by Government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government. The records of the Department of Justice reflect the installation of these wiretaps had been expressly approved by the Attorney General.

"4. Submitted with this affidavit is a sealed exhibit containing the records of the intercepted conversations, a description of the premises that were the subjects of the surveillances, and copies of the memoranda reflecting the Attorney General's express approval of the instal-

lation of the surveillances.

"5. I certify that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court in camera. Accordingly, the sealed exhibit referred to herein is being submitted solely for the court's in camera inspection and a copy of the sealed exhibit is not being furnished to the defendants. I would request the court, at the conclusion of its hearing on this matter, to place the sealed exhibit in a sealed envelope and return it to the Department of Justice where it will be retained under seal so that it may be submitted to any appellate court that may review this matter."

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This court stayed the order of the District Court pending hearing and final disposition of the petition for writ of mandamus.

From the above-quoted statement of facts, it appears that the exact question this court must answer is:

Where the Attorney General determines that certain wiretaps are "necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government," does his authorization render such wiretaps lawful without judicial review?

## THE MANDAMUS QUESTION

Preliminary to answering this question, there is a challenge to our jurisdiction. It is claimed that mandamus is not an appropriate form of action in which to review the question just posed in the context of the instant case. It is clear that the District Court order under attack is a pretrial order, interlocutory in nature, and hence, not appealable under 28 U.S.C. §1291 (1964) which conveys appellate power to this court to review only "final" orders of the District Courts. Cogen v. United States, 278 U.S. 221 (1929). Nor is the order here under attack subject to appeal under 28 U.S.C. § 1292 (1964), which grants appellate power to this court in certain limited classes of interlocutory orders, nor under 18 U.S.C. § 3731 (Supp. V, 1965-69), which deals specifically with criminal appeals.1

It is, of course, the general rule that mandamus may not be substituted for appeal. Roche v. Evapo-

<sup>&</sup>lt;sup>1</sup>The amendment to 18 U.S.C. § 3731, approved January 2, 1971, is by its terms inapplicable to this case. Pub. L. No. 91-644, § 14 (Jan. 2, 1971).

rated Milk Ass'n, 319 U.S. 21, 30-31 (1943); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382 (1953); Black v. Boyd, 248 F.2d 156, 159 (6th Cir. 1957); Hoffa v. Gray, 323 F.2d 178, 179 (6th Cir.), cert. denied, 375 U.S. 907 (1963); University National Stockholder's Protective Comm., Inc. v. University National Life Ins. Co., 328 F.2d 425, 426 (6th Cir.), cert. denied, 377 U.S. 933 (1964).

Petitioner United States, however, points to the All Writs Statute, 28 U.S.C. § 1651 (1964), as source of this court's power to grant the writ prayed for and argues that this is an extraordinary case wherein the respondent has entered an illegal order which, if allowed to stand, "would result in grave and irreparable

harm to legitimate Governmental interests."

Concerning the use of mandamus in \"exceptional

cases," this court has said:

It is settled that although sparingly used, the power to issue a writ of mandamus exists and will be exercised by the court when in its discretion the exceptional circumstances of the case require its use. Its use in such exceptional cases, however, does not mean that the All Writs Statute grants the appellate court a general power to supervise the administration of justice in the district court and to review any otherwise unappealable order. Black v. Boyd, 248 F. 2d 156, 159-60 (6th Cir. 1957).

See also Ex parte United States, 287 U.S. 241 (1932); LaBuy v. Howes Leather Co., 352 U.S. 249 (1957); Will v. United States, 389 U.S. 90, 95-98 (1967).

In this last case, Justice Black in a concurring

opinion said:

I agree that mandamus is an extraordinary remedy which should not be issued except in extraordinary circumstances. And I also realize that the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means "final" and thus appealable under federal statutes. Will v. United States, supra at 108.

From what has already been said, it is obvious that we agree that this is in all respects an extraordinary case. Great issues are at stake for all parties concerned. Further, the government asserts the illegality of the order, that it represents an abuse of the District Judge's discretion, and claims that it will have the effect of forcing the government to dismiss the prosecution of one defendant.

If this were not enough to occasion our deciding this case on the merits rather than on procedural grounds, it also clearly appears that the issue posed here is a basic issue which has never been decided at the appellate level by any court. It has been decided favorably to the government's position by two District Courts and adversely to the government by two others. The Courts of Appeals have the power to review by mandamus "an issue of first impression," Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964), involving a "basic and undecided problem." Id. at 110.

We hold that this court has jurisdiction to decide this petition.

<sup>&</sup>lt;sup>2</sup>United States v. Dellinger, et al., Criminal No. 69-180 (U.S.D.C. N.D. Ill. E.D.) decided February 20, 1970; United States v. O'Neal, Criminal KC-CR. 1204 (U.S.D.C. D. Kansas) decided September 1, 1970; United States v. Smith, Criminal No. 4277 (U.S.D.C. C.D. California) decided January 6, 1971; and the instant case, respectively.

# THE FOURTH AMENDMENT

The District Judge in issuing the disclosure order relied upon the Fourth Amendment to the Constitution of the United States, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

In a series of cases, the United States Supreme Court has held that electronic surveillance and recordation by wiretap is a search and seizure governed by the Fourth Amendment. Silverman v. United States, 365 U.S. 505 (1961); Katz v. United States, 389 U.S. 347 (1967); Alderman v. United States, 394 U.S. 165 (1969); Giordano v. United States, 394 U.S. 310 (1969); Taglianetti v. United States, 394 U.S. 316 (1969).

The basic holding of these cases is set forth in the Katz case by Mr. Justice Stewart:

The Government urges that, because its agents relied upon the decisions in Olmstead and Goldman, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the

search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause, Agnello v. United States, 269 U.S. 20, 33, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . . 'Wong Sun v. United States, 371 U.S. 471, 481-482. 'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' United States v. Jeffers, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment 18-subject only: to a few specifically established and well-delineated exceptions.19

"It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporane-

<sup>&</sup>quot;18 See, e.g., Jones v. United States, 357 U.S. 493, 497-499; Rios v. United States, 364 U.S. 253, 261; Chapman v. United States, 365 U.S. 610, 613-615; Stoner v. California, 376 U.S. 483, 486-487.

See, e.g., Carroll v. United States, 267 U.S., 132, 153, 156;
 McDonald v. United States, 335 U.S. 451, 454-456; Brinegar v. United States, 338 U.S. 160, 174-177; Cooper v. California, 386 U.S. 58; Warden v. Hayden, 387 U.S. 294, 298-300.

ous with an individual's arrest could hardly be deemed an 'incident' of that arrest. Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent."

Katz v. United States, 389 U.S. 347, 356-58 (1967).

(Footnotes in quotation.)

These cases and the requirement of judicial review just quoted represent settled law which the government does not dispute as generally applicable. It is, as we have noted, however, the government's position

"20 In Agnello v. United States, 269 U.S. 20, 30, the Court stated:

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.

Whatever one's view of the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest,' United States v. Rabinowitz, 339 U.S. 56, 61; cf. id., at 71-79 (dissenting opinion of Mr. Justice Frankfurter), the concept of an 'incidental' search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

"21 Although '[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others,' Warden v. Hayden, 387 U.S. 294, 298-299, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

"22 A search to which an individual consents meets Fourth Amendment requirements, Zap v. United States, 328 U.S. 624, but of course 'the usefulness of electronic surveillance depends on lack of notice to the suspect.' Lopez v. United States, 373 U.S. 427, 463 (dissenting opinion of Mr. Justice Brennan)."

that in "national security" cases the President of the United States, in his capacity as Chief Executive, has unique powers of the "sovereign" which serve to exempt him and his agents from the judicial review restrictions of the Fourth Amendment.

## THE PRESIDENTIAL POWER

The sweep of the assertion of the Presidential power is both eloquent and breathtaking. In the memorandum of law filed with its petition, the government asserts:

The President, in his dual role as Commander-in-Chief of the armed forces and Chief Executive, possesses another serious power and responsibility—that of safeguarding the security of the nation against those who would subvert the Government by unlawful means. This power is the historical power of the sovereign to preserve itself. (Emphasis added.)

In a supplemental memorandum, the claim is somewhat broadened:

The power at issue in this case is the inherent power of the President to safeguard the security of the nation.

We find in the government's brief no suggestion of limitations on such power, nor, indeed, any recognition that the sovereign power of this nation is by Constitution distributed among three coordinate branches of government.

While the government briefs do not identify them, there are important constitutional grants of power to the President of the United States. We find these express powers of the President of the United States set forth in the Constitution which are arguably relevant to this case:

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows . . . U.S. Const. art. II, § 1.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in

Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. Const. art. II, § 2.

public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States. U.S. Const. art II, § 3.

No express grant of power to the President to make searches and seizures without regard to the Fourth Amendment may be found in these constitutional provisions. As we have noted, the government cites no constitutional language to support its position, but it does cite some case law.

Decision of six of the cases relied upon is based upon the war powers or foreign relations powers of the presidency—Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 109 (1948); United States v. Curtiss-Wright Corp., 299 U.S. 304, 319–20 (1936); Cafeteria Workers v. Mc-Elroy, 367 U.S. 886, 890 (1961); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); United States v. Pink, 315 U.S. 203 (1942); Totten v. United States, 92 U.S. 105 (1875). None of these cases are criminal cases. None of them involve the Fourth Amendment. None of them involved wiretapping. These cases we deem totally inapplicable to the instant case where the Attorney General has certified that we deal with a domestic security problem.

Generally concerning presidential power in domestic affairs the government cites two other civil cases. In re Debs, 158 U.S. 564 (1895); Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803).

The Debs case was a petition for writ of habeas corpus. It dealt with contempt of court sentences meted out by a federal court for violation of an injunction issued during the Pullman Car strike of 1894. The opinion upheld the jurisdiction of the court which issued the injunction and entered the contempt sentences. The opinion does contain dictum which described broad powers on the part of "the national

<sup>&</sup>lt;sup>3</sup> But see Norris-LaGuardia [Anti-Injunction] Act, 29 U.S.C. §§ 101-15 (1964).

government" to employ force to "brush away" obstructions to interstate commerce and to the mails. The instant case has no relation to interstate commerce or the United States mails. And the *Debs* case can hardly be read as authority for ignoring judicial

processes.

As to Marbury v. Madison, supra, the government's citation seems to us to be questionable from its point of view. The case does deal with presidential power vis-a-vis the Constitution. But it is also Chief Justice Marshall's ringing affirmation of the supremacy of the Constitution over all three branches of government and of the authority and obligation of the Supreme Court of the United States to make binding interpretations of that document. We shall quote from Justice Marshall's language in the last section of this opinion.

As for In re Neagle, 135 U.S. 1 (1890), we thank the government for calling to our attention this fascinating story of the problems of the judiciary in an earlier day. But the holding that the President has a right under Article II, § 3 to appoint a Deputy Marshal to protect the threatened life of a Supreme Court

Justice is hardly precedent for this case.

The government also cites Abel v. United States, 362 U.S. 217 (1960). This case involved a prosecution for espionage against the most important foreign spy known to the American public in the Twentieth Century. He was an alien and, hence, subject to statutory regulations providing for administrative procedures for deportation for violations of the laws and regulations of the United States. He was arrested by warrant, which the opinion of the Court found to have been lawfully issued by a lawfully authorized magistrate, and the materials seized at the time of his

arrest were held legally admissible as incident to that arrest. Cf. Chimel v. California, 395 U.S. 752 (1969). Although there were issues in this case which divided the Court 5-4, it cannot appropriately be cited as precedent for seizure without warrant of wiretap materials in domestic security problems.

Finally, the government relies upon the fact that there are certain established exceptions to the requirement of a prior judicial warrant for a search. See Chambers v. Maroney, 399 U.S. 342 (1970); Terry v. Ohio, 392 U.S. 1 (1968); Warden v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, 384 U.S. 757 (1966). None of these cases, however, were wiretap cases. All involved emergency situations which were held to prevent obtaining or excuse absence of a prior warrant. And in all instances there was submission of evidence for subsequent judicial review.

The point at which the claim of broad inherent power of the presidency in domestic affairs actually came to decision is found in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). There President Truman's seizure of the steel mills to avoid a nationwide steel strike was defended as within his inherent power as Chief Executive charged with seeing that the laws are "faithfully executed." The Supreme Court squarely rejected the inherent power doctrine in an opinion by Mr. Justice Black, from which we quote the controlling language:

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed

on provisions in Article II which say that "The executive Power shall be vested in a President ..."; that "he shall take Care that the Laws be faithfully executed", and that he "shall be Commander in Chief of the Army and Navy

of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained be cause of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refute the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States. : . . " After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The President's order does not direct that congressional policy be executed in a manner prescribed by Congress-it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or · military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any

Department or Officer thereof."

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure caler cannot stand. Youngstown Sheet & Tube Co. v. Sawyer, supra at 587-89.

The Youngstown case, of course, had nothing to do with wiretaps. But it is the authoritative case dealing with the inherent powers of the Presidency—a doctrine which is strongly relied upon by the government in this case.

# THE WIRETAP ISSUE IN THE SUPREME COURT

Historically there have been four positions stated on the legality of wiretapping or the admissibility of evidence derived therefrom.

1. In its first encounter with the problem, the United States Supreme Court simply decided that since there was no trespass involved in the wiretap there concerned, it was therefore not a search and seizure and the Fourth Amendment did not apply to it. Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1942).

2. In Olmstead Justice Brandeis in dissent (joined by Justice Holmes, who called wiretapping a "dirty business") staked out a position which has many adherents today. This position is that wiretapping represented an unfair invasion of privacy which the government should not undertake under any circumstance.

3. The third position one which the Supreme Court came to gradually, is now the dominant one in our

<sup>\*</sup>Silverman v. United States, 365 U.S. 505 (1961); Mapp v. Ohio, 367 U.S. 643 (1961); Wong Sun v. United States, 371. U.S. 471 (1963); Osborn v. United States, 385 U.S. 323 (1966); Warden v. Hayden, 387 U.S. 294 (1967); Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967).

law and best expressed in Katz v. United States, 389 U.S. 347 (1967). The Supreme Court now clearly regards the protection of the Fourth Amendment to be one afforded to the right of privacy rather than to property. In Katz and its progeny (discussed and cited above) the Supreme Court specifically held that wiretapping which did not invade property rights was nonetheless governed by the restrictions of the Fourth Amendment.

4. The fourth position is the one just set forth in the preceding section of this opinion wherein the Attorney General and his representatives claim special powers for the presidency and for law enforcement officials acting with the authorization of the Attorney General to wiretap in "national security cases." The argument for this power is best exemplified by articles by former Attorney General Brownell and former Deputy Attorney General Rogers. Brownell, The Public Security and Wire Tapping, 39 Cornell L.Q. 195 (1954); Rogers, The Cast for Wire Tapping, 63 Yale L.J. 792 (1954), This position is also explicated in memoranda exchanged between three former Presidents of the United States and their Attorney General commanding or authorizing them to make greater or lesser use of this asserted Presidential power. See Appendix A.

It appears to us that this fourth position could (and perhaps should) be further subdivided as between foreign and domestic applications. (Note that the American Bar Association has recently adopted a similar position. ABA STANDARDS FOR ELECTRONIC SURVEILLANCE, 8 CRIM. L. REP. 3097 (Feb. 17, 1971); ABA DELEGATES APPROVE ELECTRONIC EAVESDROPPING STANDARDS, Reports and Proposals, 8 CRIM. L. REP. 2371 (Feb. 17, 1971)). But it is clear that in neither event has the specific power thus asserted ever been

the subject of adjudication in the United States Supreme Court. In fact, in footnote 23 in the Katz case, Mr. Justice Stewart, writing for the Court, expressly reserved decision thereon:

23. Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case. Katz v. United States, supra at 358 n. 23.

Even more recently in a foreign intelligence wiretap context, the Supreme Court had this issue presented on application for writ of certiorari. It denied the writ as applied to this issue. *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), cert. granted, limited to question 4, 39 U.S.L.W. 3297 (U.S. Jan. 11, 1971) (No. 783).

From what has been said, it is clear that as far as the Appellate Courts are concerned, we write upon a clean slate.

#### CONGRESSIONAL ACTION

The wiretap problem has also been the subject of great concern in the Legislative Branch of government. Early in the history of the wiretap controversy, and with little debate, Congress enacted § 605, which says in part:

no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . . 47 U.S.C. § 605 (Supp. V, 1965-69).

Section 605 played some role in the development of the Supreme Court case law. But its language (forbidding interception and divulgence in describing the offense) failed to establish a decisive policy. Private wiretappers, many of them criminal, had every interest in not divulging. And successive Attorneys General took the statute as a license to wiretap so long as their agents did not divulge. See Brownell, The Public Security and Wire Tapping, 39 Cornell L.Q. 195 (1954); Rogers, The Case for Wire Tapping, 63 Yale L.J., 792 (1954).

The Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. (Supp. V, 1965-69), was, however, a very different matter. It followed the Supreme Court decision in Katz v. United States, supra, in point of time. In many respects it followed Katz in content.

For our purposes the important sections of the bill are those which set out search warrant application procedures, those which allow an emergency exception from those procedures for 48 hours, and those which indicate that Congress was not seeking to restrict whatever constitutional power the President possessed in this field.

- (1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—
  - (a) any offense punishable by death or by imprisonment for more than one year under section 2274 through 2277 of title 42 of the United States Code (relating to the

enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under

this title:

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence). section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance; or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473

of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States.

(f) any offense including extortionate credit transactions under sections 892, 893, or 804 of this title.

or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses." 18 U.S.C. § 2516(1) (a-g) (Supp. V, 1965-69).

- (7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—
  - (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter

to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an in-

ventory shall be served as provided for in subsection (d) of this section on the person named in the application. 18 U.S.C. § 2518(7) (Supp. V. 1965-69)

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power. 18 U.S.C. § 2511(3) (Supp. V, 1965-69).

Without now passing specifically upon any of the more controversial aspects of this legislation, we view the wiretap provisions of the Omnibus Crime Bill as a general recognition by Congress that the Fourth Amendment does mandate judicial review of proposed searches and seizures of oral communications by wire. In addition, in § 2518(7)(a) Congress provided a statutory remedy for the exact sort of "national Security" problem which is presented by this

case. It is obvious, however, that the Attorney Gen-

eral chose not to employ it.

'While the government appears to rely heavily upon 18 U.S.C. § 2511(3), the language chosen by Congress, "Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President . ." is not the language used for a grant of power. On the contrary, it was in our opinion clearly designed to place Congress in a completely neutral position in the very controversy with which this case is concerned.

#### HOLDING

During more difficult times for the Republic than these, Benjamin Franklin said:

They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.

It is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of our land. No one proclaimed this message with more force than did one of the first and one of the greatest Chief Justices of the United States. In Marbury v. Madison, 1 Cranch (5.U.S.) 137 (1803), Chief Justic Marshall spoke on constitutional supremacy:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to

<sup>\*</sup>Historical Review of Pennsylvania cited in J. BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 227 (C. Morley & L. Everett ed. 1951).

be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be

transcended by those departments.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. Marbury v. Madison,

supra at 68-69.

In the same opinion Chief Justice Marshall outlined the function of the courts in interpreting the Constitution:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case

to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. Marbury v.

Madison, supra at 70.

The government has not pointed to, and we do not find, one written phrase in the Constitution, in the statutory law, or in the case law of the United States, which exempts the President, the Attorney General, or federal law enforcement from the restrictions of the Fourth Amendment in the case at hand. It is clear to us that Congress in the Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. (Supp. V, 1965-69), refrained from attempting to convey to the President any power which he did not already possess.

Essentially, the government rests its case upon the inherent powers of the President as Chief of State to defend the existence of the State. We have already shown that this very claim was rejected by the Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and we shall not repeat

its holding here.

An additional difficulty with the inherent power argument in the context of this case is that the Fourth Amendment was adopted in the immediate aftermath of abusive searches and seizures directed against American colonists under the sovereign and inherent powers of King George III. The United States Con-

stitution was adopted to provide a check upon "sovereign" power. The creation of three coordinatebranches of government by that Constitution was designed to require sharing in the administration of that awesome power.

It is strange, indeed, that in this case the traditional power of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign.

The argument for unrestricted employment of Presidential power to wiretap is basically an argument in terrorem. It suggests that constitutional government is too weak to survive in a difficult world and urges worried judges and worried citizens to return to acceptance of the security of "sovereign" power. We are earnestly urged to believe that the awesome power sought for the Attorney General will always be used with discretion.

Obviously, even in very recent days, as we shall see, this has not always been the case. And the history of English-speaking peoples (to say nothing of others) is replete with answers, See e.g., Entick v. Carrington, 19 How. St. Tr. 1029 (1765). In Marcus v. Search Warrant, 367 U.S. 717 (1961), the opinion for the United States Supreme Court summarized the long history of the English striving for freedom of expression and press and noted:

Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. Marcus v. Search Warrant, supra at 724.

The Court also pointed out that as early as the 1760's Lord Camden has denounced a "'discretionary

power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.' Id., 1167 [Wilkes v. Wood, 19 How. St. Tr. 1153]." Marcus v. Search Warrant, supra at 729.

The Court's opinion concluded:

This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power. Id. at 729.

That which has distinguished the United States of America in the history of the world has been its constitutional protection of individual liberty. It is this which has created the wonderful diversity of this great country and its many and varied opportunities. It is this which has created Justice Holmes' free market-place of ideas from which have come our most signal advances in scientific and technological achievement and in social progress. Beyond doubt the First Amendment is the cornerstone of American freedom. The Fourth Amendment stands as guardian of the First.

Of course, it should be noted that the Fourth Amendment's judicial review requirements do not prohibit the President from defending the existence of the state. Nor does the Fourth Amendment require that law enforcement officials be deprived of elec-

tronic surveulance. What the Fourth Amendment does is to establish the method they must follow.

If, as the government asserts, following that method poses security problems (because an indiscrete or corruptible judge or court employee might betray the proposed investigation), then surely the answer is to take steps to refine the method and eliminate the problems. No one could be in better position to help the courts accomplish this goal than the Attorney General.

If there be a need for increased security in the presentation of certain applications for search warrant in the federal court, these are administrative problems amenable to solution through the Chief Justice of the United States and the United States. Judicial Conference and its affiliated judicial organizations. The inclination of the judiciary to meet the practical problems of Enforcement in this area is evidenced in the specific holding of this court and the United States Supreme Court in United States v. Osborn, 350 F. 2d 497 (6th Cir. 1965), aff'd, 385 U.S. 323 (1966), and in the dictum in Katz v. United States, 389 U.S. 347 (1967), upon which the search warrant terms of the Omnibus Crime Control & Safe Streets Act § 2516 were largely based. Congress clearly conceived situations so delicate that, for example, the Attorney General might seek his warrant for a search from the Chief Judge of the appropriate United States Court of Appeals. 18 U.S.C. § 2510 (Supp. V, 1965-69). So do we. But what we cannot conceive is that in the midst of the turmoil of the present day, the courts of the United States should suspend an important principle of the Constitution. The very nature of our government requires us to defend our nation with the tools which a free society has created

and proclaimed and which, indeed, are justification for its existence.

We hold that in dealing with the threat of domestic subversion, the Executive Branch of our government, including the Attorney General and the law enforcement agents of the United States, is subject to the limitations of the Fourth Amendment to the Constitution when undertaking searches and seizures for oral communications by wire.

We seek to be equally explicit about what we do not decide in this case:

- 1) We do not decide what the President of the United States can or cannot lawfully do under his constitutional powers as Commander-in-Chief of the Army and Navy to defend this country from attack, espionage or sabotage by forces or agents of a foreign power. As we have noted, the certificate filed by the Attorney General in this case makes no reference to and claims no reliance upon any such authority.
- 2) We do not decide whether or not there were facts available to the Attorney General in this case which might have constituted probable cause for issuance of a prior warrant for the wiretaps under 18 U.S.C. § 2516 (Supp. V, 1965-69), or a subsequent warrant (within 48 hours) as provided for by 18 U.S.C. § 2518(7) (Supp. V, 1965-69). This record indicates plainly that no such applications were made. Indeed, this record is devoid of any showing that any presentation of information under oath was ever made before; or any probable cause findings were ever entered by any administrative official—let alone any judge.

In our view, the Clay case (United States v. Clay, 430 F.2d 165 (5th Cir. 1970), cert. granted, limited to question 4, 39 U.S.L.L. 3297 (U.S. Jan. 11, 1971) (No. 783)) cannot appropriately be read as authority

for warrantless wiretaps in domestic security cases. In that case the government did not contest the illegality of four separate domestic wiretaps made under the same inherent powers relied on in this case. The transcripts of defendant Clay's intercepted conversations were turned over to him by the Department of Justice. In one such instance the illegal wiretap was upon the telephone of the Rev. Martin Luther King, Jr. One wonders, if the inherent powers of the Presidency were broad enough to authorize the wiretaps in the first instance, how these wiretaps became concededly unconstitutional in court.

As to the "fifth" wiretap disclosed in the Clay case, the Attorney General's certificate said that it was "for the purpose of gathering foreign intelligence information." The Fifth Circuit did squarely hold that such foreign intelligence surveillance without judicial warrant was not a constitutional violation. This was the second issue on which certiorari was sought from the Supreme Court, but, as we have noted, the Supreme Court refused certiorari on this issue while granting certiorari on another unrelated matter.

In the case before us, however, the Attorney General's certificate makes clear that the wiretaps involved were thought to be warranted by domestic security problems. We have noted the special constitutional powers of the Presidency in foreign affairs which the Fifth Circuit thought justified his "gathering foreign intelligence information" without judicial warrant. Without passing on that issue, we reiterate that we have found no such specific constitutional authority to disregard the Fourth Amendment in domestic security cases like this one:

The last issue argued (this one by the government) concerns the order of disclosure of the overheard

conversations. In effect the government contends that even though the District Judge found the interceptions to have been illegal, he should have determined in camera that they were not relevant to this case, and hence, not subject to disclosure. This very issue has been recently decided by the United States Supreme Court in Alderman v. United States, 394 U.S. 165 (1969). In this case the opinion of the Court said:

An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who' knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case.

[I]f the hearings are to be more than a formality and petitioners not left entirely to reliance on government testimony, there should be turned over to them the records of those overheard conversations which the government was not entitled to use in building its case against them. Alderman v. United States, supra at 182-83 (Footnotes omitted).

In a subsequent but closely related case, the Supreme Court applied Alderman as giving the District Court in camera the right and duty to screen government files for the illegally intercepted conversations of a defendant and held unanimously:

Here the defendant was entitled to see a transcript of his own conversations and nothing else. He had no right to rummage in government files. Taglianetti v. United States, 394 U.S. 316, 317 (1968).

Thus the Supreme Court held that all illegally intercepted conversations of a defendant must be made available to him, but that the District Judge may in camera ascertain which transcripts are covered by this ruling. Of course, in this case we have no problem concerning standing. The government concedes that Plamondon's own voice was intercepted and recorded and the District Judge and this court have held the interception to have been illegal.

We cannot agree with the dissent that Justice Stewart's concurring opinion in *United States* v. *Giordano*, 394 U.S. 310, 313-15 (1969), in any way weakened the disclosure requirement of *Alderman*. The full text of Justice Stewart's opinion makes it clear that the "preliminary determination" with which he was concerned was whether or not "any of the surveillances *did* violate the Fourth Amendment." This determination Justice Stewart held could be made by *in camera* inspection—as has been done in this case both by the District Judge and this court

We believe that the Supreme Court has held that a defendant whose personal conversations have been illegally recorded is entitled to transcripts of the illegally recorded material without regard to whether a judge on inspection in camera might or might not be able to find relevancy. Nonetheless, we have considered remand of this case to the District Judge for an expression on the relevancy issue so as to have a complete appellate record. On inspection of the sealed exhibit in this case, however, we cannot (and we do not believe the District Judge could) ascertain

with any certainty whether or not the government had derived prosecutorial benefits from this illegal search to which benefits defendant would have the right to object at trial under the doctrine of "the fruit of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341 (1939); Wong Sun v. United States, 371 U.S. 471 (1963).

The dissent in this case makes this comment upon the sealed exhibit:

The sealed exhibit, which contained only a few pages, was examined more than once by the members of this panel. The monitored conversations took place subsequent to the bombing and after the conspiracy alleged in the indictment had terminated. They did not relate in any way either to the conspiracy or to the substantive offense charged in the indictment, and would not be relevant or admissible at the trial; nor did they lead to any relevant and admissible evidence.

If this paragraph be read as carefully as it has been written, we have no reason to disagree. With all respect, however, we think two other facts need to be added before conclusions are drawn. First, the illegal interceptions occurred well before the indictments in this case were returned, and thus they could have been employed in the investigation which led to the indictments. Second, we have no way of knowing whether or not the government's investigation was, materially aided by associations or leads developed from these conversations, regardless of whether or not the statement providing the lead appears on its face to be "admissible at the trial."

These considerations, of course, primarily affect this trial. Far more important, however, is the fact that disclosure may well prove to be the only effective protection against illegal wiretapping available to defend the Fourth Amendment rights of the American public.

For these reasons, we hold that the District Judge properly found that the conversations of defendant Plamondon were illegally intercepted, and we cannot hold that his disclosure order (as interpreted below) is an abuse of judicial discretion.

In perhaps an excess of caution, we note that we read the District Judge's disclosure order as limited solely to the transcripts and dates of defendant Plamondon's illegally intercepted telephone conversations. (See Taglianetti v. United States, supra).

The petition for writ of mandamus is denied.



### APPENDIX A

## THE WHITE HOUSE, WASHINGTON

MAY 21, . 1940.

# CONFIDENTIAL MEMORANDUM FOR THE ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excel-

In the unlikely event that this interpretation of the District Judge's order proves erroneous, the government may seek relief from any broader order by filing a motion under Rule 40, Feb. R. App. P.

lent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

(s) F. D. R.

Office of the Attorney General, Washington, D.C., July 17, 1946.\*

The PRESIDENT,
The White House.

MY DEAR MR. PRESIDENT: Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

You are therefore authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies.

This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. At the same time, the country is threatened by a very substantial increase in crime. While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to use them in cases vitally affecting the domestic security, or, where human life is in jeopardy.

As so modified, I believe the outstanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate

at the foot of this letter.

In my opinion, the measures proposed are within the authority of law, and I have in the files of the Department materials indicating to me that my two most recent predecessors as Attorney General would concur in this view.

Respectfully yours,

(8) Tom C. CLARK, Attorney General.

July 17, 1947.

(8) HARRY S. TRUMAN.

## ADMINISTRATIVELY CONFIDENTIAL

# THE WHITE HOUSE WASHINGTON

JUNE 30, 1965.

(Memorandum for the Heads of Executive Departments and Agencies)

I am strongly opposed to the interception of telephone conversations as a general investigative technique: I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of these investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guide-lines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States

<sup>\*</sup>The possibly conflicting dates are quoted as set forth in the original document.

by any mechanical or electronic device, without the consent of one of the parties involved, (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of

the Attorney General.

(3) All federal agencies shall immediately conform their practices and procedures to the pro-

visions of this order.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and unresolved questions of Constitutional interpretation. I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

(8) LYNDON B. JOHNSON:

Weick, Circuit Judge, dissenting. A two-count indictment was returned in the District Court charging the defendants, John Singlair, Lawrence Robert "Pun" Plamondon, and John Waterhouse Forrest, in the first count with entering into a conspiracy commencing on or about September 1, 1968, and continuing thereafter up to and including November 1, 1968.

to bomb by means of dynamite the offices of the Central Intelligence Agency, a facility of the United States Government, in Ann Arbor, Michigan. The second count of the indictment charged Plamondon alone with the substantive offense of damaging the facility on September 29, 1968 by dynamite, all in violation of 18 U.S.C. §§ 371 and 1361.

In its response to the motion filed by defendants for disclosure of the logs of the electronic surveillance, the Government attached an affidavit of the Attorney General stating positively that the wiretaps "were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." He certified "that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the Court in camera."

The District Judge, in his memorandum opinion, stated that the Government had submitted to him for in camera inspection a sealed exhibit containing the logs of the monitored conversations but he made no finding that the conversations were relevant to any issue in the case or might lead to the discovery of any relevant and admissible evidence. He ordered the Government to produce the logs for inspection by the defendants. He further ordered an evidentiary hearing at the end of the trial to determine the existence of taint in the indictment or in the evidence. This last order would seem to indicate that in the opinion of the District Judge the logs contained no such disclosure.

The sealed exhibit, which contained only a few pages, was examined more than once by the members of this panel.

The monitored conversations took place subsequent to the bombing and after the conspiracy alleged in the indictment had terminated. They did not relate in any way either to the conspiracy or to the substantive offense charged in the indictment, and would not be relevant or admissible at the trial; nor did they lead

to any relevant and admissible evidence.

The surveillance was not directed at Plamendon, nor at any property owned or possessed by him. Disclosure of the dates and the monitored conversations, however, might furnish valuable information to the organization under surveillance as to the activities of the Government. The Government was of the view that a protective order would furnish no protection against disclosure. The Government sought to prevent disclosure by resisting the motion to produce, and in all probability will decline to comply with the order of the District Court, which would result in the dismissal of the indictment, and the defendants would go free.

The fact that the interceptions took place before the indictments were returned is of no consequence. Since the interceptions contained no useful information relative to the conspiracy or bombing, they could

not have assisted in the investigation.

In my opinion, the District Judge could not determine illegality by merely examining the logs. He conducted no evidentiary hearing but postponed it until the end of the trial. In my opinion he abused his dis-

cretion by ordering production of the logs.

The District Court interpreted Alderman v. United States, 394 U.S. 165 (1969), as requiring an adversary proceeding to defermine illegality in every case of electronic surveillance, even though critical material may be involved and the issues in the criminal case are not complex. The majority opinion takes the

same position. I read Alderman as requiring an adversary proceeding in that case, but not as specifying the procedure to be followed by a District Court in determining illegality.

In my opinion, the interpretation of the District Court was erroneous. In decisions subsequent to Alderman, the Supreme Court clarified any ambiguity which might theretofore have existed by holding that an adversary proceeding and full disclosure are not required for resolution of every issue raised by electronic surveillance. In Giordano v. United States, 394 U.S. 310, Mr. Justice Stewart, in a concurring opinion, stated:

Moreover, we did not in Alderman, Butenko, or Ivanov, and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination. We have nowhere indicated that this determination cannot appropriately be made in ex parte, in camera proceedings. "Nothing in Alderman v. United States, Ivanov v. United States, or Butenko v. United States, ante, p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." Taglianetti v. United States, post, p. 316. (394 U.S. at 314)

In my judgment, the Supreme Court in Alderman did not abolish nor intend to impair the traditional use of in camera proceedings which for so many years have been so efficacious in the protection of the rights of litigants. There may be cases involving a multitude of documents and complex issues where an adversary proceeding is required, but such is not the case here. The sealed exhibit contains very few sheets of paper. The issues were not complex. Only Plamondon was charged with the actual bombing on September 29, 1968, and he either did or did not do it.

The precise question was resolved in favor of the Government in United States v. Clay, 430 F. 2d 165 (5th Cir. 1970), which involved five logs of electronic surveillance submitted to the District Court for in camera inspection. The Government did not challenge illegality with respect to four of the logs, and they were turned over to the defendant. None of the four related in any manner to the charge in the indictment for violation of the Selective Service laws, and had no bearing on his conviction. The fifth log which "related to the gathering of foreign intelligence was held to be lawful surveillance, reasonable and necessary to the protection of the national interest."

The District Court in Clay determined this from an in camera inspection of the fifth log and an affidavit of the Attorney General, similar in form to his affidavit in the present case. The Court declined to turn over to the defendant the fifth log. The Court further determined from the in camera inspection and the hearing with respect to the other four logs that the defendant had failed to establish relevancy.

The Court of Appeals in Clay likewise examined the fifth log in camera and agreed with the District Court that the contents of the wiretap were not germane to any issue in the criminal prosecution and that the Court was correct in declining to order its production.

In an opinion written by Judge Ainsworth, the

Court held: .

Under the circumstances here, publication of the fifth log to defendant is unwarranted and would be contrary to the national interest, having been obtained in foreign intelligence surveillance. The Court's in camera examination of the fifth log establishes to our satisfaction that the contents of the wiretap were not germane to any issue in this criminal prosecution and conviction. There has been no use against defendant of the information gained by the Government by the fifth wiretap and the information there obtained would not have been of assistance to the prosecutor in constructing a case against defendant. There is no indication that the information was or could be used in

any way against defendant.

Determination of this case requires that we balance the rights of the defendant and the national interest. The Attorney General, who acts here for the President and Commander-in-Chief, has submitted his affidavit that the fifth wiretap was maintained "for the purpose of gathering foreign intelligence information" and the Attorney General opposed disclosure at the hearing because "it would prejudice the national interest to disclose particular facts concerning this surveillance other than to the court." The fifth log was submitted by the Government for an in camera examination by the Court, which has been made both here and in the District Court. The rights of defendant and the national interest have thus been properly safeguarded. Further judicial inquiry would be improper and should not occur. It would be "intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111, 68 S. Ct. 431, 486, 92 L. Ed. 568 (1948). We, therefore, discern no constitutional prohibition against the fifth wiretap. (430 F. 2d at 171)

The Supreme Court denied certiorari in Clay as to the fifth log (issue number 2 in the Supreme Court) and granted certiorari only on issue number 4 relating to the validity of Clay's claim to exemption from the draft as a conscientious objector. 39 U.S. Law Wk. 3297.

In my opinion, the Supreme Court in declining to rule on the constitutional issue merely followed "the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties." Neese v. Southern Ry., 350 U.S. 77, 78 (1955).

In Alma Motor Co. v. Timken-Detroit Axle Co., 329

U.S. 129, 136 (1946), the Court said:

This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. This is true even though the question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided.

The Court will wait on a concrete fact situation in order to avoid rendering a series of advisory opinions. Zemel v. Rusk, 381 U.S. 1 (1965), rehearing denied, 382 U.S. 873.

The District Court should have followed the procedure adopted in Clay. Had it done so, it would not have been necessary to rule on the constitutional issues in this case.

Rule 16 of the Federal Rules of Criminal Procedure relating to pretrial discovery permits discovery only of evidence which is relevant and material. The intercepted communications were neither relevant nor material. The rule does not authorize the order entered by the District Court in the present case.

In ruling that the President, acting through the Attorney General, was without constitutional power to utilize electronic surveillance to gather intelligence information deemed necessary to protect the nation

from attempts of domestic organizations to attack and subvert the existing structure of the Government, the District Judge said:

In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our existing form of Government. If democracy as we know it, and as our forefathers established it is to stand, then 'attempts of domestic organizations to attack and subvert the existing structure of the Government' (See affidavit of Attorney General), cannot be, in and of itself, a crime. It becomes criminal only where it can be shown that such activity was accomplished through unlawful means, such as invasion of the rights of others, namely through force or violence.

The affidavit of the Attorney General of the United States makes no assertion that at the time these wiretaps were installed, law enforcement agents had probable cause to believe criminal activity (e.g. the illegal overthrow of the Government through force or violence) was being plotted. Indeed, if such probable cause did exist, a warrant to search may have properly been issued.

The established and contented members of our society are required to tolerate peaceful dissent even though they may find it difficult to understand at all times. But they are not required to tolerate, much less understand, plots of discontented members to overthrow the Government by force and violence.

In my opinion, it is the sworn duty of the President under the Constitution, as Commander-in-Chief of the Armed Forces and as Chief Executive, to protect and defend the nation from attempts of domestic subversives, as well as foreign enemies, to destroy it by force and violence. The risk of injury to the Government is just as great whether the attacks are from within or without, and domestic attacks may even be instigated, aided and abetted by a foreign power.

Attacks by domestic subversives and saboteurs may be even more dangerous than those of foreign sources, because of the difficulty of detection of "Fifth Col-

umn" activities.1

At a time when our soldiers are fighting on foreign soil and there is turbulence at home, thereby confronting the President on two fronts, with many serious, perplexing and complex problems, there rests upon his shoulders a heavy responsibility to protect, not only the fighting men abroad, but also the people at home, from destruction of their Government by domestic subversives.

The legislative and judicial branches of the Government do not have the facilities to cope with the destruction of public buildings by saboteurs. Only the Executive Department of the Government has the facilities and know-how to deal with these intricate problems. When the Chief Executive deems it necessary to gather intelligence information for this purpose he ought not to be required first to make detailed explanations of classified information to a magistrate and procure his consent as a condition precedent to the exercise of his constitutional powers.

<sup>1096</sup> bombings and 176 attempts were reported in the United States in 1970, against 549 bombings in 1969. 79 explosions were reported in January, 1971. The latest bombing was the Capitol building in Washington. U.S. News & World Report, March 15, 1971.

This would occasion delay and involve the possibility of leaks. To require the President of the United States to have probable cause before he can investigate spies, subversives,

Nor do I think that the Executive has to wait until "the activity of the subversives is accomplished through unlawful means, such as invasion of the rights of others through force and violence." It is too late to act after there has been a fait accompli.

As former Attorney General Brownell stated:

It is of course too late to do anything about it after sabotage, assassinations and fifth column activities have been completed. The Public Security and Wiretapping, 39 Cornell Law Quarterly 205.

. As well stated by Chief Justice Vinson in Dennis v. United States, 341 U.S. 494 at 509 (1951):

Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.

In Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), the Court considered the powers of the President in foreign relations in an opinion delivered by Mr. Justice Jackson, stating:

saboteurs, fifth columnists, and traitors would effectively frustrate and prevent any meaningful investigation of these persons. If the President was in possession of facts establishing probable cause he might never need to investigate. Even the Secretary of Labor may investigate a labor union without having probable cause. Goldberg v. Truck Drivers Local Union No. 299, 293 F. 2d 807 (6th Cir.), cert. denied, 368 U.S. 938 (1961).

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, with out the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry, (333 U.S. at 111)

See also Cafeteria Workers v. McElroy, 367 U.S. 886, 690 (1961); United States v. Pink, 315 U.S. 203 (1942); United States v. Curtiss Wright Corp., 299 U.S. 304, 319-320 (1936); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); In Re Debs, 158 U.S. 564 (1895); Totten v. United States, 92 U.S. 105 (1875).

I see no reason why the powers of the President should be any different in dealing with either foreign or domestic subversives; both are equally harmful; both or either could result in the destruction of the Government.

Congress, in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(3), provided exceptions to the warrant requirements of the Act, as follows:

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Referring to the exceptions, the Senate Report

states:

The only exceptions to the above prohibition are: (1) the power of the President to obtain information by such means as he may deem necessary to protect the Nation from attack or hostile acts of a foreign power, to obtain intelligence information essential to the Nation's security, and to protect the internal security of the United States from those who advocate its overthrow by force or other unlawful means. 1968 U.S.C.C. & A.N. 2153.

Sec. 2511(3) constitutes clear congressional recognition of the President's power to order electronic surveillance in national security cases.

The power of the President to order electronic surveillance in national security cases has been upheld in United States v. Clay, 430 F.2d 165 (5th Cir. 1970); United States v. Butenko, 318 F. Supp. 66 (D.N.J. 1970); and United States v. Dellinger, Crim. No. 69–180, N.D. Ill., 1970. It was denied in United States v. Smith, Crim. No. 4277, C.D. Cal., 1970.

Mr. Justice White, concurring in Katz v. United

States, 389 U.S. 347, at 363-364 (1967), said:

In joining the Court's opinion, I note the Court's acknowledgment that there are circumstances in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases. Wire-tapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restriction's against wiretapping. See Berger v. New York, 388 U.S. 41, 112-118 (1967) (White, J., dissenting). We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

Justices Douglas and Brennan expressed contrary views, 389 U.S. at 359–360. The Supreme Court has not decided the issue. *Giordano* v. *United States*, 394 U.S. 310, 314.

I regard as inapposite the case of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which involved seizure by the President of private property in order to prevent a strike which he thought would seriously affect the economy of the country. The protection of the Government against attacks

designed to overthrow it by force and violence involves an entirely different matter.

In my opinion, the surveillance in the present case

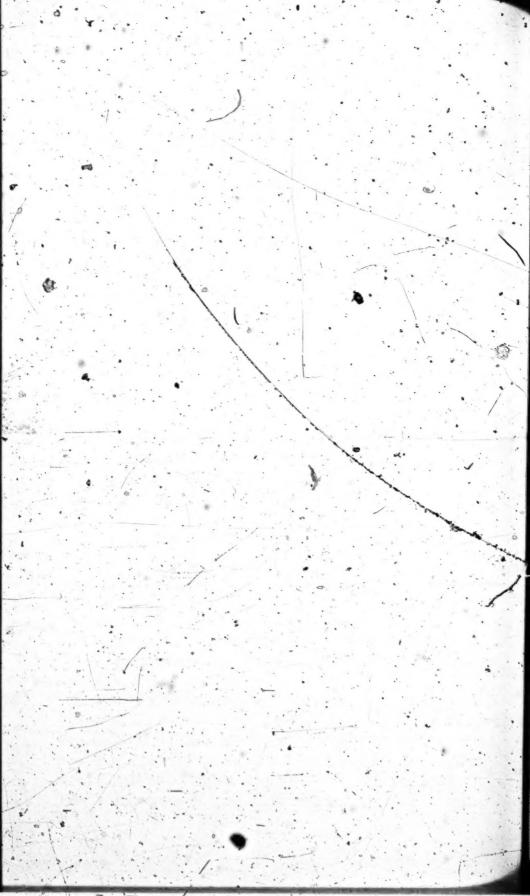
was reasonable.

It has been said that wiretapping is dirty business. Professor Wigmore answered this argument:

But so is likely to be all apprehension of malefactors. Kicking a man in the stomach is 'dirty business' normally viewed, but if a gunman assails you and you know enough of the French art of savatage to kick him in the stomach and thus save your life, is that dirty business, for you? 8 Wigmore on Evidence § 2184(b), p. 50. Also 23 Ill. L.Rev. 377 (1928).

I agree that the remedy of mandamus is appropriate.

I would grant the writ and vacate the order of the District Court.



# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71-1105

[Filed Apr. 8, 1971, Carl W. Reuss, Clerk]

United States of America, petitioner .

vs.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, AND HONORABLE DAMON J. KEITH; RESPONDENT

#### ORDER

BEFORE: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

In accordance with the opinion this day filed, the petition for writ of mandamus is hereby denied. Judge Weick dissents.

Entered by order of the Courte

/s/ Carl W. Reuss Clerk

## SUPREME COURT OF THE UNITED STATES

No. 1687, October Term, 1970

UNITED STATES, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, ET AL.

ORDER ALLOWING CERTIORARI—Filed June 21, 1971

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.



# In the Supreme Court of the United States

OCTOBER TERM, 1970

#### No.

# UNITED STATES OF AMERICA, PETITIONER

U.

United States District Court for the Eastern District of Michigan, Southern Division and Hon. Damon J. Keith

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

#### OPINIONS BELOW

The opinion of the court of appeals (App. A, infra) is not yet reported. The opinion of the district court (App. B, infra) is not reported.

### **JURISDICTION**

On April 8, 1971, the Court of Appeals denied the government's petition for a writ of mandamus seeking to compel the respondent district judge to vacate

a pretrial order entered in a pending criminal case. The judgment of the court of appeals is set forth in App. C, infra. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

1. Whether electronic surveillance is reasonable within the meaning of the Fourth Amendment when it has been specifically authorized by the President, acting through the Attorney General, to gather intelligence information deemed necessary to protect against attempts to overthrow the government by force or other unlawful means or against other clear and present dangers to the government's structure or existence.

2. If such national security surveillances are inlawful, whether—notwithstanding Alderman v. United States, 394 U.S. 165—it would be appropriate for the district court to determine in camera whether the interceptions are arguably relevant to the prosecution before requiring their disclosure to the defendant.

#### STATUTE INVOLVED

The pertinent provisions of the Omnibus Crime Control and Safe Streets Act of 1968 are set forth in App. D. infra.

#### STATEMENT

This petition arises from a driminal proceeding, pending trial in the United States District Court for the Eastern District of Michigan, in which the three defendants are charged with conspiracy to destroy government property in violation of 18 U.S.C. 371, and one of the defendants, Plamondon, is charged with destruction of government property in violation of 18 U.S.C. 1361. The charges arose from the bombing of an office of the Central Intelligence Agency in Ann Arbor, Michigan.

In the course of pretrial proceedings, the defendants filed a motion for disclosure of electronic surveillance information. With its response, the government filed and served upon the movants an affidavit of the Attorney General of the United States, acknowledging that government agents had overheard conversations participated in by Plamondon; it also filed the logs of these surveillances as a sealed exhibit.

The Attorney General's affidavit reads as follows:

John N. MITCHELL being duly sworn deposes and says:

1. I am the Attorney General of the United States.

2. This-affidavit is submitted in connection with the Government's opposition to the disclosure to the defendant Plamondon of information concerning the overhearing of his conversations which occurred during the course of electronic surveillances which the Government contends were legal.

3. The defendant Plamondon has participated in conversations which were overheard by Government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government. The records of the Department of Justice reflect the installation of these wiretaps had been expressly approved by the Attorney General.

4. Submitted with this affidavit is a sealed exhibit containing the records of the intercepted conversations, a description of the premises that were the subjects of the surveil-

The sealed exhibit is part of the record before this Court.

lances, and copies of the memoranda reflecting the Attorney General's express approval of the installation of the surveillances.

5. I certify that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court in camera. Accordingly, the sealed exhibit referred to herein is being submitted sole by for the court's in camera inspection and a copy of the sealed exhibit is not being furnished to the defendants. I would request the court, at the conclusion of its hearing on this matter, to place the sealed exhibit in a sealed envelope and return it to the Department of Justice where it will be retained under seal so that it may be submitted to any appellate court that may review this matter.

On the basis of this affidavit and the sealed exhibit, the government asserted that the surveillances were lawful, though conducted without prior judicial approval, as a reasonable exercise of the President's power (exercised through the Attorney General) to utilize the investigative resources at his disposal to secure the intelligence necessary for preservation of the national security.

Judge Keith rejected this argument, and held that the surveillance, because it had not received prior judicial sanction, violated the Fourth Amendment. He ordered the government to make full disclosure to Plamondon of his overheard conversations looking toward an evidentiary hearing to determine taint at the conclusion of the trial. App. B, infra.

The government then filed in the court of appeals a petition for a writ of mandamus to set aside this

order. The court of appeals denied the petition. It agreed that the case was an appropriate one for mandamus, since the order was not appealable and raised "[g]reat issues \* \* \* for all parties concerned" that were of first impression in any appellate court (App. A, infra, p. 15). It held, however (by a two-to-one vote), that the district court had properly found the surveillances unlawful under the Fourth Amendment, and had properly required their disclosure. The court further rejected the government's alternative argument that even if the surveillances were illegal the special circumstances of this case made appropriate an in camera determination, without disclosure to the defendant, that the conversations intercepted were wholly irrelevant to the prosecution.

#### REASONS FOR GRANTING THE WRIT

1. The issue of the President's authority to order warrantless electronic surveillance in national security cases is plainly an issue of national importance that warrants this Court's consideration. Its determination is required both for the guidance of the lower federal courts in the conduct of criminal prosecutions and for the guidance of the executive in carrying out its obligation to utilize all lawful measures—and only those measures that are lawful—in the protection of the national security both internationally and domestically.

Presidentially authorized surveillance in national security cases without previous judicial sanction has

The court noted the government's representation that affirmance of the disclosure order would force the dismissal of the prosecution against Plamondon. *Ibid*.

been undertaken by successive Presidents over a period of thirty years,3 and was given explicit recognition by Congress in the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 18 U.S.C. (Supp. V) 2511(3). This well established practice was thought to be a proper exercise of Presidential power. lawful under the Fourth Amendment. The court below. in the first appellate consideration of this question, held to the contrary, as did Judge Keith in the district court. One district court has agreed, United States v. Smith, 321 F. Supp. 424 (C.D. Calif.); but two district courts have upheld the power, United States v. Dellinger, et al., Criminal No. 69-180, N.D. Ill. E.D., decided February 20, 1970; United States v. O'Neal, Criminal No. KC-CR 1204, D. Kan., decided September 1, 1970.

The Fourth Amendment does not forbid all seizures without a warrant. There is no constitutional require-

<sup>&</sup>lt;sup>3</sup> See the orders of Presidents Roosevelt, Truman and Johnson, set forth as Appendices to the opinion of the court of appeals (App. A, *infra*, pp. 44-48).

<sup>&#</sup>x27;The Dellinger decision is pending on appeal to the Court of Appeals for the Seventh Circuit, The government has petitioned for a writ of mandamus in the Court of Appeals for the Ninth Circuit seeking vacation of the order in the Smith case. The O'Neal case has not been appealed; the defendant has fled the jurisdiction.

ment that there must always be judicial intervention before a search and seizure can be made. The Constitution forbids only "unreasonable" searches and seizures, and the use of that word obviously implies some flexibility. The scope of the flexibility is subject to judicial supervision, but the particular seizure need not be. In the present case, power auxiliary to the responsibilities of the President, our Chief Magistrate, and by him expressly delegated to the Attorney General, for whom the President is responsible, provides the basis for reasonableness specified by the Constitution.

The presidential power relied on to make lawful the surveillance in this case is narrowly defined and limited by strict procedural safeguards. First, the area of "national security" is limited by the Omnibus Crime Control and Safe Streets Act of 1968 to five particular governmental concerns: (1) protection against actual or potential attack or other hostile acts of a foreign power; (2) gathering of foreign intelligence information deemed essential to the security of the United States; (3) protection of national security information against foreign intelligence activities; (4) protection against the overthrow of the government by force or other unlawful means; and (5) protection against any other clear and present danger to the structure or existence of the government (see Appendix D, infra). As the Attorney General's affidavit indicates (pp. 3-4, supra) the

The Court of Appeals for the Fifth Circuit recently indicated that it did not consider a warrantless national security surveillance, limited exclusively to foreign intelligence information, constitutionally defective. *United States* v. Clay, 430 F. 2d 165. This Court's limited grant of certiorari in that case, 400 U.S. 990, did not disturb this holding.

surveillance in this case was based primarily upon the last two of these concerns; of course, these concerns may frequently tend to merge with the first three, since the line between domestic activity and foreign intelligence is often blurred, or merged. It is also important that such electronic surveillance is authorized only by the Attorney General—and no other official—acting on behalf of the President.

Thus, the issue is whether, in the areas defined above, the standard of reasonableness specified by the Fourth Amendment allows the judgment of the President's chief law enforcement officer—who is directly accountable to the President and through him to the electorate—to be relied upon in this narrow and important area of national security in lieu of the judgment of the numerous judges and magistrates who may happen to have jurisdiction in the locality where a warrant might be sought.

2. If national security surveillances of the kind here involved are at variance with the Fourth Amendment, then we suggest that this Court should reconsider what procedures are appropriate and necessary to assure that a particular criminal prosecution is not tainted by them. The automatic disclosure requirement seemingly established by Alderman v. United States, 394 U.S. 165, for every situation of unlawful interception of a defendant's voice—which was applied below—is, we suggest, inappropriate and unnecessary in a case such as the present one. We urge the Court to consider again whether the district courts should be permitted to screen such national security interceptions in camera to determine whether they are arguably relevant to the prosecution before directing

that they be disclosed to the defendant, withholding those that the court can satisfy itself are not arguably relevant. Cf. Taglianetti v. United States, 394 U.S. 316. This is, we submit, an adequate protection of the defendant's Fourth Amendment rights, and it is necessary to relieve the government of the dilemma of either dropping a prosecution of a serious criminal offense (as here) or revealing information damaging to the national security.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MAY 1971.

## APPENDIX A

# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(No. 71-1105—Decided and Filed April 8, 1971.)

(ON PETITION FOR WRIT OF MANDAMUS)

UNITED STATES OF AMERICA, PETITIONER.

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION AND HONORABLE DAMON J. KEITH, RESPONDENT

Before Phillips, Chief Judge, Weick and Edwards, Circuit Judges

EDWARDS, Circuit Judge. At issue in this case is the power of the Attorney General of the United States as agent of the President to authorize wiretapping in internal security matters without judicial sanction.

This case has importance far beyond its facts or the

litigants concerned.

If decided in favor of the government, the citizens of these United States lose the protection of an independent judicial review of the cause and reasonableness of secret recordation by federal law enforcement of thoughts and expressions which had been uttered in privacy. If it is decided in favor of the respondent, it may prejudice an important criminal prosecution. And more important, of course, in all future surveillances undertaken in internal security matters, it may

add at least some dimension of risk of exposure of federal investigatorial intentions.

The background of this case is the pending trial in the United States District Court for the Eastern District of Michigan in Detroit of three young men for conspiracy to destroy government property in Ann Arbor, Michigan, in violation of 18 U.S.C. § 371 (1964). One of them named Plamondon was also charged with destruction of government property in a value exceeding \$100, in violation of 18 U.S.C. § 1361 (1964). The particular case before us is a petition for writ of mandamus filed originally in this court by the United States to compel the District Judge who is presiding at the Detroit trial to vacate an order directing the United States to "make full disclosure to defendant Plamondon of his monitored conversations."

#### STATEMENT OF FACTS

For purposes of this case, we accept the statement of facts from the petition filed by the United States:

On December 7, 1969, defendants in the court below were indicted by a Federal Grand Jury for destruction of Government property in violation of 18 U.S.C. 1361. In the course of the pre-trial proceedings, defendants filed a motion for disclosure of certain electronic surveillance information. That motion was granted by respondent, and petitioner has been ordered by respondent to disclose the information sought. Respondent's Order is the subject of this petition.

On October 5, 1970, defendants filed a "Motion for Disclosure of Electronic or other Surveillance, For a Pretrial Hearing, To Suppress Evidence and to Dismiss the Indictment." \* \* \*

On December 18, 1970, petitioner filed, in response, an opposition to defendants' motion. By way of an affidavit of the Attorney General.

of the United States, John N. Mitchell, which was attached to petitioner's opposition, petitioner acknowledged that one of the defendants, Lawrence Robert "Pun" Plamondon, had participated in conversations which were overheard by government agents. The logs of these surveillances were given to respondent in the form of a sealed exhibit for respondent's in camera inspection only and are available to this Court on those terms as well.

Oral argument was had before respondent on January 16, 1971; on January 25, 1971, respondent, holding that the surveillance was illegal, granted defendants' motion and ordered petitioner to disclose the information sought. Respondent then granted petitioner a 48-hour stay which was, in turn, extended to and including February 9, 1971, to afford petitioner an opportunity to present this matter to this

Court.

To this statement of facts the United States also attached the affidavit of Attorney General Mitchell—the full context of which follows:

"JOHN N. MITCHELL being duly sworn de-

"1. I am the Attorney General of the United States.

<sup>&</sup>quot;It is important to note at this point that although he was overheard, defendant Plamondon was not the object of the surveillance. This distinction apparently went unnoticed by respondent for he stated in his decision ordering disclosure that the Attorney General 'had authorized and deemed necessary the wire tapping of certain of defendant Plamondon's conversations.'

<sup>&</sup>quot;The sealed exhibit submitted to the court below will quickly demonstrate that defendant Plamondon was not the object of the surveillance, and petitioner respectfully refers this Court's attention to that exhibit and the additional sealed exhibit being made available to the Court for the grounds and objectives of the Attorney General's authorization." (Footnote in quotation.)

♠ "2. This affidavit is submitted in connection
with the Government's opposition to the disclosure to the defendant Plamondon of information concerning the overhearing of his conversations which occurred during the course of
electronic surveillances which the Government

contends were legal.

"3. The defendant Plamondon has participated in conversations which were overheard by Government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government. The records of the Department of Justice reflect the installation of these wiretaps had been expressly approved by the Attorney General.

"4. Submitted with this affidavit is a sealed exhibit containing the records of the intercepted conversations, a description of the premises that were the subjects of the surveillances, and copies of the memoranda reflecting the Attorney General's express approval of the instal-

lation of the surveillances.

"5. I certify that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court in camera. Accordingly, the sealed exhibit referred to herein is being submitted solely for the court's in camera inspection and a copy of the sealed exhibit is not being furnished to the defendants. I would request the court, at the conclusion of its hearing on this matter, to place the sealed exhibit in a sealed envelope and return it to the Department of Justice where it will be retained under seal so that it may be submitted to any appellate court that may review this matter."

This court stayed the order of the District Court pending hearing and final disposition of the petition for writ of mandamus.

From the above-quoted statement of facts, it appears that the exact question this court must answer is:

Where the Attorney General determines that certain wiretaps are "necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government," does his authorization render such wiretaps lawful without judicial review?

# THE MANDAMUS QUESTION

Preliminary to answering this question, there is a challenge to our jurisdiction. It is claimed that mandamus is not an appropriate form of action in which to review the question just posed in the context of the instant case. It is clear that the District Court order under attack is a pretrial order, interlocutory in nature, and hence, not appealable under 28 U.S.C. § 1291 (1964) which conveys appellate power to this court to review only "final" orders of the District Courts. Cogen v. United States, 278 U.S. 221 (1929). Nor is the order here under attack subject to appeal under 28 U.S.C. § 1292 (1964), which grants appellate power to this court in certain limited classes of interlocutory orders, nor under 18 U.S.C. § 3731 (Supp. V, 1965-69), which deals specifically with criminal appeals.1

It is, of course, the general rule that mandamus may not be substituted for appeal. Roche v. Evapo-

The amendment to 18 U.S.C. § 3731, approved January 2, 1971, is by its terms inapplicable to this case. Pub. L. No. 91-644, § 14 (Jan. 2, 1971).

rated Milk Ass'n, 319 U.S. 21, 30-31 (1943); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382 (1953); Black v. Boyd, 248 F.2d 156, 159 (6th Cir. 1957); Hoffa v. Gray, 323 F.2d 178, 179 (6th Cir.), cert. denied, 375 U.S. 907 (1963); University National Stockholder's Protective Comm., Inc. v. University National Life Ins. Co., 328 F.2d 425, 426 (6th Cir.), cert. denied, 377 U.S. 933 (1964).

Petitioner United States, however, points to the All Writs Statute, 28 U.S.C. § 1651 (1964), as source of this court's power to grant the writ prayed for and argues that this is an extraordinary case wherein the respondent has entered an illegal order which, if allowed to stand, "would result in grave and irreparable harm to legitimate Governmental interests."

Concerning the use of mandamus in "exceptional

eases," this court has said :.

It is settled that although sparingly used, the power to issue a writ of mandamus exists and will be exercised by the court when in its discretion the exceptional circumstances of the case require its use. Its use in such exceptional cases, however, does not mean that the All Writs Statute grants the appellate court a general power to supervise the administration of justice in the district court and to review any otherwise unappealable order. Black v. Boyd, 248 F. 2d 156, 159-60 (6th Cir. 1957).

See also Ex parte United States, 287 U.S. 241 (1932); LaBuy V. Howes Leather Co., 352 U.S. 249 (1957); Will V. United States, 389 U.S. 90, 95-98 (1967).

In this last case, Justice Black in a concurring opinion said:

I agree that mandamus is an extraordinary remedy which should not be issued except in

extraordinary circumstances. And I also realize that the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means "final" and thus appealable under federal statutes. Will v. United States, supra at 108.

From what has already been said, it is obvious that we agree that this is in all respects an extraordinary case. Great issues are at stake for all parties concerned. Further, the government asserts the illegality of the order, that it represents an abuse of the District Judge's discretion, and claims that it will have the effect of forcing the government to dismiss the prosecution of one defendant.

If this were not enough to occasion our deciding this case on the merits rather than on procedural grounds, it also clearly appears that the issue posed here is a basic issue which has never been decided at the appellate level by any court. It has been decided favorably to the government's position by two District Courts and adversely to the government by two others. The Courts of Appeals have the power to review by mandamus "an issue of first impression," Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964), involving a "basic and undecided problem." Id. at 110.

We hold that this court has jurisdiction to decide this petition.

United States v. Dellinger, et al., Criminal No. 69-180 (U.S.D.C. N.D. III. E.D.) decided February 20, 1970; United States v. O'Neal, Criminal KC-CR. 1204 (U.S.D.C. D. Kansas) decided September 1, 1970; United States v. Smith, Criminal No. 4217 (U.S.D.C. C.D. California) decided January 6, 1971; and the instant case, respectively.

The District Judge in iss relied upon the Fourth Amtion of the United States, w

The right of the persons, houses, par unreasonable searche, be violated, and no upon probable cause affirmation, and par place to be searched, to be seized. U.S. Cox

In a series of cases, the Court has held that ele recordation by wiretap is erned by the Fourth Amend States, 365 U.S. 505 (1961 389 U.S. 347 (1967); Alder U.S. 165 (1969); Giordano 310 (1969); Taglianetti v. 316 (1969).

The basic holding of the Katz case by Mr. Justice Sta

The Government agents relied upon and Goldman, and here than they migh prior judicial sanctic validate their conducts apparent that the with restraint. Yet this restraint was im selves, not by a judicequired, before comment their estimate tached scrutiny by a were not compelled,

ecise limits estabic court order. Nor e search had been orizing magistrate seized. In the abis Court has never sole ground that to find evidence oluntarily confined trusive means cones conducted with unlawful notwithy showing probable tates, 269 U.S. 20, uires 'that the deof a judicial offien the citizen and . United States, 371 d again this Court mandate of the ires adherence to tates v. Jeffers, 342 s conducted outside prior approval by er se unreasonable ent 18-subject only hed and well-delin-

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57 U.S. 493, 497-499; Chapman v. United California, 376 U.S.

67 U.S., 132, 153, 156; , 454–456; Brinegar v. oper v. California, 386 298–300. ous with an individual's arrest could hardly be deemed an 'incident' of that arrest." Nor could the use of electronic surveillance without prior authorization be justified on grounds of 'hot pursuit.' And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent."

Katz v. United States, 389 U.S. 347, 356-58 (1967). (Footnotes in quotation.)

These cases and the requirement of judicial review just quoted represent settled law which the government does not dispute as generally applicable. It is, as we have noted, however, the government's position

In Agnello v. United States, 269 U.S. 20, 30, the Court stated:

'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.'

Whatever one's view of the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest,' United States v. Rabinowitz, 339 U.S. 56, 61; cf. id., at 71-79 (dissenting opinion of Mr. Justice Frankfurter), the concept of an 'incidental' search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Warden v. Hayden, 387 U.S. 294, 298-299, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

Amendment requirements, Zap v. United States, 328 U.S. 624, but of course 'the usefulness of electronic surveillance depends on lack of notice to the suspect.' Lopes v. United States, 378 U.S. 427, 463 (dissenting opinion of Mr. Justice Brennan)."

that in "national security" cases the President of the United States, in his capacity as Chief Executive, has unique powers of the "sovereign" which serve to exempt him and his agents from the judicial review restrictions of the Fourth Amendment.

# THE PRESIDENTIAL POWER

The sweep of the assertion of the Presidential power is both eloquent and breathtaking. In the memorandum of law filed with its petition, the government asserts:

The President, in his dual role as Commander-in-Chief of the armed forces and Chief Executive, possesses another serious power and responsibility—that of safeguarding the security of the nation against those who would subvert the Government by unlawful means. This power is the historical power of the sovereign to preserve itself. (Emphasis added.)

In a supplemental memorandum, the claim is somewhat broadened:

The power at issue in this case is the inherent power of the President to safeguard the security of the nation.

We find in the government's brief no suggestion of limitations on such power, nor, indeed, any recognition that the sovereign power of this nation is by Constitution distributed among three coordinate branches of government.

While the government briefs do not identify them, there are important constitutional grants of power to the President of the United States. We find these express powers of the President of the United States ext forth in the Constitution which are arguably relevant to this case:

The executive Power shall be vested in a President of the United States of America He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected as follows ... . U.S. Const. art. II. § 1.

The President shall be Commander in Chief of the Army and Navy of the United States. and of the Militia of the several States; when called into the actual Service of the United States: he may require the Opinion, in writing: of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in

Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate. shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States. whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. Const. art. II, § 2.

. he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States. U.S. Const. art II, 63.

No express grant of power to the President to make searches and seizures without regard to the Fourth Amendment may be found in these constitutional provisions. As we have noted, the government cites no constitutional language to support its position, but it does cite some case law.

Decision of six of the cases relied upon is based upon the war powers or foreign relations powers of the presidency—Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 109 (1948); United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-20 (1936); Cafeteria Workers v. Mc-Elroy, 367 U.S. 886, 890 (1961); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); United States v. Pink, 315 U.S. 203 (1942); Totten v. United States, 92 U.S. 105 (1875). None of these cases are criminal cases. None of them involved wiretapping. These cases we deem totally inapplicable to the instant case where the Attorney General has certified that we deal with a domestic security problem.

Generally concerning presidential power in domestic affairs the government cites two other civil cases. In re Debs, 158 U.S. 564 (1895); Marbury v. Madi-

son, 1 Cranch (5 U.S.) 137 (1803).

The Debs case was a petition for writ of habeas corpus. It dealt with contempt of court sentences meted out by a federal court for violation of an injunction issued during the Pullman Car strike of 1894. The opinion upheld the jurisdiction of the court which issued the injunction and entered the contempt sentences. The opinion does contain dictum which described broad powers on the part of "the national

<sup>&</sup>lt;sup>3</sup> But see Norris-LaGuardia [Anti-Injunction] Act, 29 U.S.C. §§ 101-15 (1964).

government" to employ force to "brush away" obstructions to interstate compared and to the mails. The instant case has no relation to interstate commerce or the United States mails. And the Debs case can hardly be read as authority for ignoring judicial processes.

As to Marbury v. Madison, supra, the government's citation seems to us to be questionable from its point of view. The case does deal with presidential power vis-a-vis the Constitution. But it is also Chief Justice Marshall's ringing affirmation of the supremacy of the Constitution over all three branches of government and of the authority and obligation of the Suprema Court of the United States to make hinding interpretations of that document. We shall quote from Justice Marshall's language in the last section of this opinion.

As for In re Neagle, 135. U.S. 1 (1890), we thank the government for calling to our attention this fascinating story of the problems of the judiciary in an earlier day. But the holding that the President has a right under Article II, § 3 to appoint a Deputy Marshal to protect the threatened life of a Supreme Court

Justice is hardly precedent for this case.

The government also cites Abel v. United States, 362 U.S. 217 (1960). This case involved a prosecution for espionage against the most important foreign spy known to the American public in the Twentieth Century. He was an alien and, hence, subject to statutory regulations providing for administrative procedures for deportation for violations of the laws and regulations of the United States. He was arrested by warrant, which the opinion of the Court found to have been lawfully issued by a lawfully authorized magistrate, and the materials seized at the time of his

arrest were held legally admissible as incident to that arrest. Cf. Chimel v. California, 395 U.S. 752 (1969). Although there were issues in this case which divided the Coast 54, it cannot appropriately be cited as precedent for seizure without warrant of wiretap

materials in domestic security problems.

Finally, the government relies upon the fact that there are certain established exceptions to the requirement of a prior judicial warrant for a search. See Chambers V. Maroney, 399 U.S. 342 (1970); Terry v. Ohio, 392 U.S. 1 (1968); Warden v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, 384 U.S. 757 (1966). None of these cases, however, were wiretap cases. All involved emergency situations which were held to prevent obtaining or excuse absence of a prior warrant. And in all instances there was submission, of evidence for subsequent judicial review.

The point at which the claim of broad inherent power of the presidency in domestic affairs actually came to decision is found in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). There President Truman's seizure of the steel mills to avoid a nationwide steel strike was defended as within his inherent power as Chief Executive charged with seeing that the laws are "faithfully executed." The Supreme Court squarely rejected the inherent power doctrine in an opinion by Mr. Justice Black, from which we quote the controlling language:

It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed

on provisions in Agticle II which say that "The executive Power shall be vested in a President ..."; that "he shall take Care that the Laws be faithfully executed", and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such eases need not concern us here. Even though "theater of war". be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In . the framework of our Constitution, the President's power to see that the laws are faithfully executed refute the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States. . . . " After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for earrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United

States, or in any Department or Officer thereof."

The President's order does not direct that congressional policy be executed in a manner prescribed by Congress-it directs that a presidential policy be executed in a manner prescribed by the President. The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution. The power of Congress to adopt such public policies as those proclaimed by the order is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand. Youngstown. Sheet & Tube Co. v. Sawyer, supra at 587-89.

The Youngstown case, of course, had nothing to do with wiretaps. But it is the authoritative case dealing with the inherent powers of the Presidency—a doctrine which is strongly relied upon by the government in this case.

#### THE WIRETAP ISSUE IN THE SUPREME COURT

Historically there have been four positions stated on the legality of wiretapping or the admissibility of evidence derived therefrom.

1. In its first encounter with the problem, the United States Supreme Court simply decided that since there was no trespass involved in the wiretap there concerned, it was therefore not a search and seizure and the Fourth Amendment did not apply to it. Olmstead v. United States, 277 U.S. 438 (1928); Goldman v. United States, 316 U.S. 129 (1942).

2. In Olmstead Justice Brandeis in dissent (joined by Justice Holmes, who called wiretapping a "dirty business") staked out a position which has many adherents today. This position is that wiretapping represented an unfair invasion of privacy which the government should not undertake under any circumstance.

3. The third position, one which the Supreme Court came to gradually, is now the dominant one in our

<sup>\*</sup>Silverman v. United States, 365 U.S. 505 (1961); Mapp v. Ohio, 367 U.S. 643 (1961); Wong Sun v. United States, 371 U.S. 471 (1963); Osborn v. United States, 385 U.S. 328 (1966); Warden v. Hayden, 387 U.S. 294 (1967); Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347, (1967).

law and best expressed in Katz v. United States, 389 U.S. 347 (1967). The Supreme Court now clearly regards the protection of the Fourth Amendment to be one afforded to the right of privacy rather than to property. In Katz and its progeny (discussed and cited above) the Supreme Court specifically held that wiretapping which did not invade property rights was nonetheless governed by the restrictions of the Fourth Amendment.

4. The fourth position is the one just set forth in the preceding section of this opinion wherein the Attorney General and his representatives claim special powers for the presidency and for law enforcement officials acting with the authorization of the Attorney General to wiretap in "national security cases," The argument for this power is best exemplified by articles by former Attorney General Brownell and former Deputy Attorney General Rogers. Brownell, The Public Security and Wire Tapping, 39 Cornell L.Q. 195 (1954); Rogers, The Case for Wire Tapping, 63 YALE L.J. 792 (1954), This position is also explicated in memoranda exchanged between three former Presidents of the United States and their Attorney General commanding or authorizing them to make greater or lesser use of this asserted Presidential power. See Appendix A.

It appears to us that this fourth position could (and perhaps should) be further subdivided as between foreign and domestic applications. (Note that the American Bar Association has recently adopted a similar position. ABA STANDARDS FOR ELECTRONIC SURVEILLANCE, 8 CRIM. L. REP. 3097 (Feb. 17, 1971); ABA DELEGATES APPROVE ELECTRONIC EAVESDROPPING STANDARDS, Reports and Proposals, 8 CRIM. L. REP. 2371 (Feb. 17, 1971)). But it is clear that in neither event has the specific power thus asserted ever been

the subject of adjudicat preme Court. In fact, in Mr. Justice Stewart, wri reserved decision thereor

23. Whether safe; thorization by a property form of the national security this case. Kate 358 n. 23.

Even more recently in a context, the Supreme Context, the Supreme Context application for write write as applied to this 430 F.2d 165 (5th Cir. 1) question 4, 39 U.S.L.W (No. 783).

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CONGRESS:

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Section 605 played son the Supreme Court casa bidding interception and offense) failed to estable

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& Safe Streets Act of Supp. V, 1965-69), was, ter. It followed the Suv. United States, supra, spects it followed Katz

tant sections of the bill h warrant application in emergency exception hours, and those which not seeking to restrict the President possessed

leral, or any Assistant ly designated by the Atnorize an application to petent jurisdiction for, int in conformity with er an order authorizing eption of wire or oral Federal Bureau of Inagency having responsion of the offense as to made, when such interhas provided evidence

unishable by death or r more than one year hrough 2277 of title 42 Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under

this title.

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473

of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, mari-

huana, or other dangerous drugs, punishable under any law of the United States.

(f) any offense including extortionate credit transactions under sections 892, 893,

or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses." 18 U.S.C. § 2516(1) (a-g) (Supp. V, 1965-69).

- (7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—
  - (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter

to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an in-

ventory shall be served as provided for in subsection (d) of this section on the person named in the application. 18 U.S.C. § 2518(7) (Supp.

V, 1965-69).

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or. oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power. 18 U.S.C. § 2511(3) (Supp. V, 1965-69).

Without now passing specifically upon any of the more controversial aspects of this legislation, we view the wiretap provisions of the Omnibus Crime Bill as a general recognition by Congress that the Fourth Amendment does mandate judicial review of proposed searches and seizures of oral communications by wire. In addition, in § 2518(7)(a) Congress provided a statutory remedy for the exact sort of "national Security" problem which is presented by this

case. It is obvious, however, that the Attorney General chose not to employ it.

While the government appears to rely heavily upon 18 U.S.C. § 2511(3), the language chosen by Congress, "Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President . . ." is not the language used for a grant of power. On the contrary, it was in our opinion clearly designed to place Congress in a completely neutral position in the very controversy with which this case is concerned.

#### HOLDING

During more difficult times for the Republic than these, Benjamin Franklin said:

They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.

It is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of our land. No one proclaimed this message with more force than did one of the first and one of the greatest Chief Justices of the United States. In Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803), Chief Justic Marshall spoke on constitutional supremacy:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to

<sup>\*</sup>Historical Review of Pennsylvania cited in J. Bartlett, Bartlett's Familiar Quotations 227 (C. Morley & L. Everett ed. 1951).

be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are de-

signed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. Marbury v. Madison,

supra at 68-69.

In the same opinion Chief Justice Marshall outlined the function of the courts in interpreting the Constitution:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws, conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes

on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. Marbury v.

Madison, supra at 70.

The government has not pointed to, and we do not find, one written phrase in the Constitution, in the statutory law, or in the case law of the United States, which exempts the President, the Attorney General, or federal law enforcement from the restrictions of the Fourth Amendment in the case at hand. It is clear to us that Congress in the Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. (Supp. V, 1965-69), refrained from attempting to convey to the President any power which he did not already possess.

Essentially, the government rests its case upon the oinherent powers of the President as Chief of State to defend the existence of the State. We have already shown that this very claim was rejected by the Supreme Court in Youngstown, Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and we shall not repeat.

its holding here.

An additional difficulty with the inherent power argument in the context of this case is that the Fourth Amendment was adopted in the immediate aftermath of abusive searches and seizures directed against American colonists under the sovereign and inherent powers of King George III. The United States Con-

stitution was adopted to provide a check upon "sovereign" power. The creation of three coordinate branches of government by that Constitution was designed to require sharing in the administration of that awesome power.

It is strange, indeed, that in this case the traditional power of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign.

The argument for unrestricted employment of Presidential power to wiretap is basically an argument in terrorem. It suggests that constitutional government is too weak to survive in a difficult world and urges worried judges and worried citizens to return to acceptance of the security of "sovereign" power. We are earnestly urged to believe that the awesome power sought for the Attorney General will always be used with discretion.

Obviously, even in very recent days, as we shall see, this has not always been the case. And the history of English speaking peoples (to say nothing of others) is replete with answers. See e.g., Entick v. Carrington, 19 Hew. St. Tr. 1029 (1765). In Marcus v. Search Warrant, 367 U.S. 717 (1961), the opinion for the United States Supreme Court summarized the long history of the English striving for freedom of expression and press and noted:

Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. Marcus v. Search Warrant, supra at 724.

The Court also pointed out that as early as the 1760's Lord Camden has denounced a "'discretionary

power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.' Id., 1167 [Wilkes v. Wood, 19 How. St. Tr. 1153]." Marcus v. Search Warrant, supra at 729.

The Court's opinion concluded:

This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power. Id. at 729.

That which has distinguished the United States of America in the history of the world has been its constitutional protection of individual liberty. It is this which has created the wonderful diversity of this great country and its many and varied opportunities. It is this which has created Justice Holmes' free market-place of ideas from which have come our most signal advances in scientific and technological achievement and in social progress. Beyond doubt the First Amendment is the cornerstone of American freedom. The Fourth Amendment stands as guardian of the First.

Of course, it should be noted that the Fourth Amendment's judicial review requirements do not prohibit the President from defending the existence of the state. Nor does the Fourth Amendment require that law enforcement officials be deprived of electronic survenlance. What the Fourth Amendment does is to establish the method they must follow.

If, as the government asserts, following that method poses security problems (because an indiscrete or corruptible judge or court employee might betray the proposed investigation), then surely the answer is to take steps to refine the method and eliminate the problems. No one could be in better position to help the courts accomplish this goal than the Attorney General.

If there be a need for increased security in the presentation of certain applications for search warrant in the federal court, these are administrative problems amenable to solution through the Chief Justice of the United States and the United States. Judicial Conference and its affiliated judicial organizations. The inclination of the judiciary to meet the practical problems of enforcement in this area is evidenced in the specific holding of this court and the United States Supreme Court in United States v. Osborn, 350 F. 2d 497 (6th Cir. 1965), aff'd, 385 U.S. 323 (1966), and in the dictum in Katz v. United States, 389 U.S. 347 (1967), upon which the search warrant terms of the Omnibus Crime Control & Safe Streets Act § 2516 were largely based. Congress clearly conceived situations so delicate that, for example, the Attorney General might seek his warrant for a search from the Chief Judge of the appropriate United States Court of Appeals. 18 U.S.C. § 2510 (Supp. V. 1965-69). So do we. But what we cannot conceive is that in the midst of the turmoil of the present day, the courts of the United States should suspend an important principle of the Constitution. The very nature of our government requires us to defend our nation with the tools which a free society has created

and proclaimed and which, indeed, are justification for its existence.

We hold that in dealing with the threat of domestic subversion, the Executive Branch of our government, including the Attorney General and the law enforcement agents of the United States, is subject to the limitations of the Fourth Amendment to the Constitution when undertaking searches and seizures for oral communications by wire.

We seek to be equally explicit about what we do not decide in this case:

- 1) We do not decide what the President of the United States can or cannot lawfully do under his constitutional powers as Commander-in-Chief of the Army and Navy to defend this country from attack, espionage or sabotage by forces or agents of a foreign power. As we have noted, the certificate filed by the Attorney General in this case makes no reference to and claims no reliance upon any such authority.
- 2) We do not decide whether or not there were facts available to the Attorney General in this case which might have constituted probable cause for issuance of a prior warrant for the wiretaps under 18 U.S.C. § 2516 (Supp. V, 1965-69), or a subsequent warrant (within 48 hours) as provided for by 18 U.S.C. § 2518(7) (Supp. V, 1965-69). This record indicates plainly that no such applications were made. Indeed, this record is devoid of any shewing that any presentation of information under oath was ever made before, or any probable cause findings were ever entered by any administrative official—let alone any judge.

In our view, the Clay case (United States v. Clay, 430 F.2d 165 (5th Cir. 1970), cert. granted, limited to question 4, 39 U.S.L.L. 3297 (U.S. Jan. 11, 1971) (No. 783)) cannot appropriately be read as authority

for warrantless wiretap. In that case the gover illegality of four separ under the same inherent. The transcripts of defenders at the transcripts of defenders are turned ment of Justice. In one stap was upon the telepholic King, Jr. One wonders, Presidency were broad taps in the first instance concededly unconstitution.

As to the "fifth" wiret the Attorney General's "for the purpose of gainformation." The Fifth that such foreign intellipudicial warrant was no This was the second is sought from the Supranted, the Supreme Course while granting cermatter.

In the case before us, eral's certificate makes element to be war problems. We have not powers of the Presidency Fifth Circuit thought justintelligence information' Without passing on that have found no such specto disregard the Fourth curity cases like this one.

The last issue argued (concerns the order of (

overnment contends that dge found the intercepshould have determined ot relevant to this case. closure. This very issue v the United States Su-United States, 394 U.S. pinion of the Court said: ent phrase, a chance rewhat appears to be a , the identity of a caller he other end of a telener of speaking or using significance to one who te facts of an accused's rmation may be wholly meaning to one less well vant circumstances. Unter of judgment, but in too complex, and the reat, to rely wholly on it of the trial court to which might have conent's case.

to be more than a fornot left entirely to reliimony, there should be records of those overch the government was nilding its case against ited States, supra atd).

related case, the Suas giving the District, duty to screen governercepted conversations nously: Here the defendant was entitled to see a transcript of his own conversations and nothing else. He had no right to rummage in government files. *Taglianetti* v. *United States*, 394 U.S. 316, 317 (1968).

Thus the Supreme Court held that all illegally intercepted conversations of a defendant must be made available to him, but that the District Judge may in camera ascertain which transcripts are covered by this ruling. Of course, in this case we have no problem concerning standing. The government concedes that Plamondon's own voice was intercepted and recorded and the District Judge and this court have held the interception to have been illegal.

We cannot agree with the dissent that Justice Stewart's concurring opinion in United States v. Giordano, 394 U.S. 310, 313-15 (1969), in any way weakened the disclosure requirement of Alderman. The full text of Justice Stewart's opinion makes it clear that the "preliminary determination" with which he was concerned was whether or not "any of the surveillances did violate the Fourth Amendment." This determination Justice Stewart held could be made by in camera inspection—as has been done in this case both by the District Judge and this court. We believe that the Supreme Court has held that a defendant whose personal conversations have been illegally recorded is entitled to transcripts of the illegally recorded material without regard to whether

a defendant whose personal conversations have been illegally recorded is entitled to transcripts of the illegally recorded material without regard to whether a judge on inspection in camera might or might not be able to find relevancy. Nonetheless, we have considered remand of this case to the District Judge for an expression on the relevancy issue so as to have a complete appellate record. On inspection of the sealed exhibit in this case, however, we cannot (and we do not believe the District Judge could) ascertain

with any certainty whether or not the government had derived prosecutorial benefits from this illegal search to which benefits defendant would have the right to object at trial under the doctrine of "the fruit of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341 (1939); Wong Sun v. United States, 371 U.S. 471 (1963).

The dissent in this case makes this comment upon the sealed exhibit:

The sealed exhibit, which contained only a few pages, was examined more than once by the members of this panel. The monitored conversations took place subsequent to the bombing and after the conspiracy alleged in the indictment had terminated. They did not relate in any way either to the conspiracy or to the substantive offense charged in the indictment, and would not be relevant or admissible at the trial; nor did they lead to any relevant and admissible evidence.

If this paragraph be read as carefully as it has been written, we have no reason to disagree. With all respect, however, we think two other facts need to be added before conclusions are drawn. First, the illegal interceptions occurred well before the indictments in this case were returned, and thus they could have been employed in the investigation which led to the indictments. Second, we have no way of knowing whether or not the government's investigation was materially aided by associations or leads developed from these conversations, regardless of whether or not the statement providing the lead appears on its face to be "admissible at the trial."

These considerations, of course, primarily affect this trial. Far more important, however, is the fact that disclosure may well prove to be the only effectiveprotection against illegal wiretapping available to defend the Fourth Amendment rights of the American

public.

For these reasons, we hold that the District Judge properly found that the conversations of defendant Plamondon were illegally intercepted, and we cannot hold that his disclosure order (as interpreted below) is an abuse of judicial discretion.

In perhaps an excess of caution, we note that we read the District Judge's disclosure order as limited solely to the transcripts and dates of defendant Plamondon's illegally intercepted telephone conversations. (See Taglianetti v. United States, supra).

The petition for writ of mandamus is denied.

#### APPENDIX A

### THE WHITE HOUSE, WASHINGTON

MAY 21, 1940.

# CONFIDENTIAL MEMORANDUM FOR THE ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excel-

In the unlikely event that this interpretation of the District Judge's order proves erroneous, the government may seek relief from any broader order by filing a motion under Rule 40, Feb. R. App. P.

lent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

(s) F. D. R.

OFFICE OF THE ATTORNEY GENERAL, Washington, D.C., July 17, 1946,\*

The PRESIDENT,
The White House.

My DEAR MR. PRESIDENT: Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

You are therefore authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies.

This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. At the same time, the country is threatened by a very substantial increase in crime. While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to use them in cases vitally affecting the domestic security, or where human life is in jeopardy.

As so modified, I believe the outstanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate

at the foot of this letter.

In my opinion, the measures proposed are within the authority of law, and I have in the files of the Department materials indicating to me that my two most recent predecessors as Attorney General would concur in this view.

Respectfully yours,

Attorney General.

July 17, 1947.\* I concur.

(s) HARRY S. TRUMAN.

## ADMINISTRATIVELY CONFIDENTIAL

#### THE WHITE HOUSE WASHINGTON

JUNE 30, 1965.

(Memorandum for the Heads of Executive Departments and Agencies)

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of these investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guidelines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States

The possibly conflicting dates are quoted as set forth in the original document.

by any mechanical or electronic device, without the consent of one of the parties involved, (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of

the Attorney General.

(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and unresolved questions of Constitutional interpretation. I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

(s) LYNDON B. JOHNSON.

Weick, Circuit Judge, dissenting. A two-count indictment was returned in the District Court charging the defendants, John Sinclair, Lawrence Robert "Pun" Plamondon, and John Waterhouse Forrest, in the first count with entering into a conspiracy commencing on or about September 1, 1968, and contining thereafter up to and including November 1, 1968,

to bomb by means of dynamite the offices of the Central Intelligence Agency, a facility of the United States Government, in Ann Arbor, Michigan. The second count of the indictment charged Plamondon Cone with the substantive offense of damaging the facility on September 29, 1968 by dynamite, all in violation of 18.U.S.C. §§ 371 and 1361.

In its response to the motion filed by defendants for disclosure of the logs of the electronic surveillance, the Government attached an affidavit of the Attorney General stating positively that the wiretaps "were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." He certified "that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the Court in camera."

The District Judge, in his memorandum opinion, stated that the Government had submitted to him for in camera inspection a sealed exhibit containing the logs of the monitored conversations but he made no finding that the conversations were relevant to any issue in the case or might lead to the discovery of any relevant and admissible evidence. He ordered the Government to produce the logs for inspection by the defendants. He further ordered an evidentiary hearing at the end of the trial to determine the existence of taint in the indictment or in the evidence. This last order would seem to indicate that in the opinion of the District Judge the logs contained no such disclosure.

The sealed exhibit, which contained only a few pages, was examined more than once by the members of this panel.

The monitored conversations took place subsequent to the bombing and after the conspiracy alleged in the indictment had terminated. They did not relate in any way either to the conspiracy or to the substantive offense charged in the indictment, and would not be relevant or admissible at the trial; nor did they lead to any relevant and admissible evidence.

The surveillance was not directed at Plamendon, nor at any property owned or possessed by him. Disclosure of the dates and the monitored conversations, however, might furnish valuable information to the organization under surveillance as to the activities of the Government. The Government was of the view that a protective order would furnish no protection against disclosure. The Government sought to prevent disclosure by resisting the motion to produce, and in all probability will decline to comply with the order of the District Court, which would result in the dismissal of the indictment and the defendants would go free.

The fact that the interceptions took place before the indictments were returned is of no consequence. Since the interceptions contained no useful information relative to the conspiracy or bombing, they could not have assisted in the investigation.

In my opinion, the District Judge could not determine illegality by merely examining the logs. He conducted no evidentiary hearing but postponed it until the end of the trial. In my opinion he abused his discretion by ordering production of the logs.

The District Court interpreted Alderman v. United States, 394 U.S. 165 (1969), as requiring an adversary proceeding to determine illegality in every case of electronic surveillance, even though critical material may be involved and the issues in the criminal case are not complex. The majority opinion takes the

same position. I read Alderman as requiring an adversary proceeding in that case, but not as specifying the procedure to be followed by a District Court in determining illegality.

In my opinion, the interpretation of the District Court was erroneous. In decisions subsequent to Alderman, the Supreme Court clarified any ambiguity which might theretofore have existed by holding that an adversary proceeding and full disclosure are not required for resolution of every issue raised by electronic surveillance. In Giordano v. United States, 394 U.S. 310, Mr. Justice Stewart, in a concurring opinion, stated:

Moreover, we did not in Alderman, Butenko, or Ivanov, and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination. We have nowhere indicated that this determination cannot appropriately be made in ex parte, in camera proceedings. "Nothing in Alderman v. United States, Ivanov v. United States, or Butenko v. United States, ante, p. 165, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." Taglianetti v. United States, post, p. 316. (394 U.S. at 314)

In my judgment, the Supreme Court in Alderman did not abolish nor intend to impair the traditional use of in camera proceedings which for so many years have been so efficacious in the protection of the rights of litigants. There may be cases involving a multitude of documents and complex issues where an adversary proceeding is required, but such is not the case here. The sealed exhibit contains very few sheets of paper. The issues were not complex. Only Plamondon was charged with the actual bombing on September 29, 1968, and he either did or did not do it.

The precise question Government in United (5th Cir. 1970), which surveillance submitted camera inspection. The illegality with respect were turned over to the related in any manner for violation of the Sono bearing on his conference of the gatherical held to be lawful survey sary to the protection of the sono bearing on his conference of the survey sary to the protection of the survey survey

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In an opinion writte Court held:

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is criminal prosecution as been no use against mation gained by the h wiretap and the ind would not have been ecutor in constructing. There is no indication as a could be used in ut.

case requires that we he defendant and the Attorney General, who at and Commander-ineffidavit that the fifth for the purpose of Ence information" and posed disclosure at the ald prejudice the naparticular facts cone other than to the ubmitted by the Gova examination by the rade both here and in ghts of defendant and e thus been properly icial inquiry would be t occur. It would be ithout the relevant inand perhaps nullify taken on information reago & Southern Air Corp., 333 U.S. 103, . Ed. 568 (1948). We, titutional prohibition 430 F. 2d at 171)

rtiorari in Clay as to the Supreme Court) issue number 4 reclaim to exemption us objector. 39 U.S. In my opinion, the Supreme Court in declining to rule on the constitutional issue merely followed "the traditional practice of this Court of refusing to decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised before us by the parties." Neese v. Southern Ry., 350 U.S. 77, 78 (1955).

In Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 136 (1946), the Court said:

This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. This is true even though the question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided.

The Court will wait on a concrete fact situation in order to avoid rendering a series of advisory opinions. Zemel v. Rusk, 381 U.S. 1 (1965), rehearing denied, 382 U.S. 873.

The District Court should have followed the procedure adopted in *Clay*. Had it done so, it would not have been necessary to rule on the constitutional issues in this case.

Rule 16 of the Federal Rules of Criminal Procedure relating to pretrial discovery permits discovery only of evidence which is relevant and material. The intercepted communications were neither relevant nor material. The rule does not authorize the order entered by the District Court in the present case.

- In ruling that the President, acting through the Attorney General, was without constitutional power to utilize electronic surveillance to gather intelligence information deemed necessary to protect the nation

from attempts of domestic organizations to attack and subvert the existing structure of the Government, the District Judge said:

In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our existing form of Government. If democracy as we know it, and as our forefathers established it is to stand, then 'attempts of domestic organizations to attack and subvert the existing structure of the Government' (See affidavit of Attorney General), cannot be, in and of itself, a crime. It becomes criminal only where it can be shown that such activity was accomplished through unlawful means, such as invasion of the rights of others, namely through force or violence.

The affidavit of the Attorney General of the United States makes no assertion that at the time these wiretaps were installed, law enforcement agents had probable cause to believe criminal activity (e.g. the illegal overthrow of the Government through force or violence) was being plotted. Indeed, if such probable cause did exist, a warrant to search may have properly been issued.

The established and contented members of our society are required to tolerate peaceful dissent even though they may find it difficult to understand at all times. But they are not required to tolerate, much less understand, plots of discontented members to overthrow the Government by force and violence.

In my opinion, it is the sworn duty of the President under the Constitution, as Commander-in-Chief of the Armed Forces and as Chief Executive, to protect and defend the nation from attempts of domestic subversives, as well as foreign enemies, to destroy it by force and violence. The risk of injury to the Government is just as great whether the attacks are from within or without, and domestic attacks may even be instigated, aided and abetted by a foreign power.

Attacks by domestic subversives and saboteurs may be even more dangerous than those of foreign sources, because of the difficulty of detection of "Fifth Col-

umn" activities.1

At a time when our soldiers are fighting on foreign soil and there is turbulence at home, thereby confronting the President on two fronts, with many serious, perplexing and complex problems, there rests upon his shoulders a heavy responsibility to protect, not only the fighting men abroad, but also the people at home, from destruction of their Government by domestic subversives.

The legislative and judicial branches of the Government do not have the facilities to cope with the destruction of public buildings by saboteurs. Only the Executive Department of the Government has the facilities and know-how to deal with these intricate problems. When the Chief Executive deems it necessary to gather intelligence information for this purpose he ought not to be required first to make detailed explanations of classified information to a magistrate and procure his consent as a condition precedent to the exercise of his constitutional powers.

United States in 1970, against 549 bombings in 1969. 79 explosions were reported in January, 1971. The latest bombing was the Capitol building in Washington. U.S. News & World Report, March 15, 1971.

<sup>&</sup>lt;sup>2</sup> This would occasion delay and involve the possibility of leaks. To require the President of the United States to have probable cause before he can investigate spies, subversives,

Nor do I think that the Executive has to wait until "the activity of the subversives is accomplished through unlawful means, such as invasion of the rights of others through force and violence." It is too late to act after there has been a fait accompli.

As former Atterney General Brownell stated:

It is of course too late to do anything about it after sabotage, assassinations and fifth column activities have been completed. The Public Security and Wiretapping, 39 Cornell Law Quarterly 205.

As well stated by Chief Justice Vinson in *Dennis* v. *United States*, 341 U.S. 494 at 509 (1951):

Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.

In Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948), the Court considered the powers of the President in foreign relations in an opinion delivered by Mr. Justice Jackson, stating:

If the President was in possession of facts establishing probable cause he might never need to investigate. Even the Secretary of Labor may investigate a labor union without having probable cause. Goldberg v. Truck Drivers Local Union No. 299, 293 F. 2d 807 (6th Cir.), cert. denied, 368 U.S. 938 (1961).

saboteurs, fifth columnists, and traitors would effectively frustrate and prevent any meaningful investigation of these persons. If the President was in possession of facts establishing prob-

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs. has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and which has long. been held to belong in the domain of political power not subject to judicial intrusion or inquiry. (333 U.S. at 111)

See also Cafeteria Workers v. McElroy, 367 U.S. 886, 690 (1961); United States v. Pink, 315 U.S. 203 (1942); United States v. Curtiss Wright Corp., 299 U.S. 304, 319-320 (1936); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); In Re Debs, 158 U.S. 564 (1895); Totten v. United States, 92 U.S. 105 (1875).

I see no reason why the powers of the President should be any different in dealing with either foreign or domestic subversives; both are equally harmful; both or either could result in the destruction of the Government.

Congress, in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(3), provided exceptions to the warrant requirements of the Act, as follows:

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take. such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the everthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of . the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Referring to the exceptions, the Senate Report states:

The only exceptions to the above prohibition are: (1) the power of the President to obtain information by such means as he may deem necessary to protect the Nation from attack or hostile acts of a foreign power, to obtain intelligence information essential to the Nation's security, and to protect the internal security of the United States from those who advocate its overthrow by force or other unlawful means. 1968 U.S.C.C. & A.N. 2153.

Sec. 2511(3) constitutes clear congressional recognition of the President's power to order electronic surveillance in national security cases.

The power of the President to order electronic surveillance in national security cases has been upheld in United States v. Clay, 430 F.2d 165 (5th Cir. 1970); United States v. Butenko, 318 F. Supp. 66 (D.N.J. 1970); and United States v. Dellinger, Crim. No. 69-180, N.D. Ill., 1970. It was denied in United States v. Smith, Crim. No. 4277, C.D. Cal', 1970.

. Mr. Justice, White; concurring in Katz v. United

States, 389 U.S. 347, at 363-364 (1967), said:

In joining the Court's opinion, I note the Court's acknowledgment that there are circumstances in which it is reasonable to search without a warrant. In this connection, in footnote 23 the Court points out that today's decision does not reach national security cases. Wire-tapping to protect the security of the Nation has been anthorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. See Berger v. New York, 388 U.S. 41, 112-118 (1967) (White, J., dissenting). We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

Justices Douglas and Brennan expressed contrary views, 389 U.S. at 359-360. The Supreme Court has not decided the issue. Giordano v. United States, 394 U.S. 310, 314.

I regard as inapposite the case of Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which involved seizure by the President of private property in order to prevent a strike which he thought would seriously affect the economy of the country. The protection of the Government against attacks

designed to overthrow it by force and violence involves an entirely different matter.

In my opinion, the surveillance in the present case was reasonable.

It has been said that wiretapping is dirty business. Professor Wigmore answered this argument:

But so is likely to be all apprehension of malefactors. Kicking a man in the stomach is 'dirty business' normally viewed, but if a gunman assails you and you know enough of the French art of savatage to kick him in the stomach and thus save your life, is that dirty business for you? 8 Wigmore on Evidence § 2184(b), p. 50. Also 23 Ill. L.Rev. 377 (1928).

I agree that the remedy of mandamus is appropriate.

I would grant the writ and vacate the order of the District Court.

### APPENDIX B

# UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

CRIMINAL No. 44375

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN SINCLAIR,
LAWRENCE ROBERT "PUN" PLAMONDON,
JOHN WATERHOUSE FORREST, DEFENDANTS

Memorandum Opinion and Order Granting Defendants' Motion for Disclosure of Electronic or Other Surveillance

After the return of the indictment in the present case, but before the commencement of trial, counsels for the defendants filed a motion for disclosure of electronic surveillance in accordance with the United States Supreme Court's holding in Alderman v. United States, 394 U.S. 165 (1969). In essence the motion requests an order from the Court directing the Government to divulge to defendants all logs, records, and memoranda of electronic surveillance directed at any of the defendants or unindicted co-conspirators, and it further requests that a hearing be held to determine whether any of the evidence upon which the indictment is based or which the Government intends to introduce at trial was tainted by such surveillance. In response to this motion the Government submitted

an answer which stated the ment had no knowledge of pertaining to any of the dinquiry was then being a Bureau of Investigation. The ment stated that the Unit would advise the Court if electronic monitoring was event, would file a reply to disclose.

. Subsequently, the Court by the United States A Mitchell, stating that he h necessary the wiretapping Plamondon's conversation were submitted with this a inspection of the Court in c these materials was a mot ant's request for disclosur dence and a brief in suppothe affidavit and the above General has certified that particular facts concernin prejudice the national inter been requested that the Go to any decision regarding determine how it will proce ants have submitted reply position that this electroni mitted to them for their inv was heard regarding this is 16th, 1971.

In Alderman v. United Society Court held that the Governmake available to a defend standing, any conversations

ie Government overlegal electronic surnis ruling is to reinionary rule of the ng the Government dence which is obds. In the instant was a party to the e requisite standing se a motion for disbecomes necessary nce involved hereindefendant's Fourth as evolved that disthe District Court vas conducted ille-Justice White in S. 310 (1968).

at in this matter. : monitoring of dewas lawful in ance was initiated arrant. In support contends that the agent of the Presto authorize elecwarrant in the inlidity of the Govinder the Fourth d by the Supreme Inited States, 389 however, a small ch concern themits oral argument . United States vs. .

Felix Lindsey O'Neal, Criminal No. KC-CR-1204 (D.

C. Kan., September 1, 1970), a case in which the District Judge made an in-court ruling that surveil lance pursuant to the authorization of the Attorney General was lawful. See, also, *United States of America* vs. *Dellinger*, Criminal No. CR 69–180 (N.D. Ill., February 20, 1970); *United States* v. *Clay*, No. 783, O.T. (5th Cir., July 6, 1970) cert. pending.

Particularly noteworthy, and the basis of defendant's oral argument in support of his motion for disclosure, is the exceptionally well-reasoned and thorough opinion of the Honorable Judge Warren Ferguson of the Central District of California. U.S. v. Smith, Criminal No. 4277-CD (C.D. Cal., January 8, 1971). The affidavit and circumstances which were represented before Judge Ferguson are identical to the affidavit and issues now before this Court for consideration, and the Court is compelled to adopt the rule and rationale of the Smith case in reaching its decision today.

The great umbrella of personal rights protected by the Fourth Amendment has unfolded slowly, but very deliberately, throughout our legal history. The celebrated cases of Weeks v. United States, 232 U.S. 383 (1914), and Mapp v. Ohio, 367 U.S. 643 (1961). became the cornerstone of the amendment's foundation and together these decisions established the prec edent that evidence secured in violation of a de fendant's Fourth Amendment rights could not be admitted against him at his trial, In Silverthorn Lumber Co. v. United States, 251 U.S. 385 (1920); the familiar legal simile of the "poisonous tree" became the pillar for the Court's ruling that the exclusionary rule of Weeks was to be expanded to prohibit the ad mission of any fruits derived from illegally seized evidence. The final buttress to this canopy of Fourt

Amendment protection is derived from the Court's declaration that the Fourth Amendment protects a defendant from the evil of the uninvited ear. In Silverman v. United States, 365 U.S. 505 (1961), and Katz v. United States, 389 U.S. at 347, the Court ruled that oral statements, if illegally overheard, and their fruits are also subject to suppression.

In the instant case the Government apparently ignores the overwhelming precedent of these cases and argues that the President, acting through the Attorney General, has the inherent Constitutional power: (1) to authorize without judicial warrant, electronic surveillance in "national security" cases; and. (2) to determine unilaterally whether a given situation is a matter within the concept of national security. The Court cannot accept this proposition for we are a country of laws and not of men.

The Government contends that the President can conduct warrantless surveillances under the authority of the Omnibus Crime Control and Safe Streets Act of 1968. The effect of this comprehensive statute is to make unauthorized surveillance a serious crime, and the general rule of the act is that Government surveillance and/or wiretapping is permitted only upon the showing of probable cause and the issuance of a warrant. An exception to this general rule permits the President to legally authorize electronic surveillance "to obtain foreign intelligence information deemed essential to the security of the United States."

The Act also provides:

Nothing contained in this chapter or in Section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack

or other hostile acts of a foreign power, or to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government . . .

In addressing himself to the relevance of this statutory provision to the warrantless surveillance issue. Judge Ferguson of the California District Court stated succinctly that; "Regardless of these exceptions in the criminal statute the President is, of course, still subject to the Constitutional limitations imposed upon him by the constitution. This Court is in full accord with this rationale for it is axiomatic that the Constitution is the Supreme Law of the Land. Marbury v. Madison, 1 Cranch (5 U.S.) 137."

The contention by the Government that in cases involving "national security" a warrantless search is not an illegal one, must be cautiously approached and analyzed. We are, after all, dealing not with the rights of one solitary defendant, but rather, we are here concerned with the possible infringement of a fundamental freedom guaranteed to all American citizens. In the first Supreme Court case involving wiretapping, Justice Brandeis concisely stated the issue at stake in a case of this nature:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. Olmstead v. United States, 277 U.S. 438, 478 (1928).

It is to be remembered that the protective sword which is enshrouded in the scabbard of Fourth Amendment rights and which insures that these fundamental rights will remain inviolate, is the well defined rule of exclusion. And, in turn, the cutting edge of the exclusionary rule is derived from the requirement that the Government obtain a search warrant before it can conduct a lawful search and seizure. It is this procedure of obtaining a warrant that inserts the impartial judgment of the Court between the citizen and the government.

Generally, in order to search a citizen's premises, law enforcement agents must appear before the Court or Magistrate and request a warrant. The request must describe the place to be searched, matter to be seized, and, most importantly there must be a statement made under oath that the Government has probable cause to believe that criminal activity exists. Through this procedure, we as citizens are assured the protection of our constitutional right to be free from unreasonable searches and seizures by the maintenance of a system of checks and balances between the arms of government. Prior to issuance of any search

warrant the Court must independently review the request to search and make an objective determination whether or not probable cause of some criminal activity exists, which activity would make the searching reasonable and not in violation of Fourth Amendment rights. In absence of such a requirement of an objective determination by a magistrate, law enforcement officials would be permitted to make their own evaluation as to the reasonableness, the scope, and the evidence of probable cause for a search. This Court is loath to let such a condition come to exist.

In its brief the Government cites several cases which have held that the President has the authority to authorize electronic surveillance which he deems is necessary to protect the nation against the hestile acts of foreign powers. Using this precedent the Government submits that the President should also have the constitutional power to gather information concerning domestic organizations which seek to attack and subvert the Government by unlawful means. This argument, however, is untenable for although it has long been recognized that the President has unique and plenary powers in the field of foreign relations; Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); in the area of domestic affairs the Government can act only in limited ways. See, Brandenburg v. Ohio 395 U.S. 444 (1969).

The Government also asserts that the President's authority for warrantless monitoring stems from a confidential memorandum written by President Roose velt in 1940. But if the President is given power to delegate who shall conduct wiretaps, the question arises whether there is any limit on this power. Furthermore, the Smith case, supra, in tracing the history of the Roosevelt directive, establishes that the Presidential power of surveillance is specifically limited

to "exceptional cases"—cases of a non-criminal nature or which concern the country's international security.

An idea which seems to permeate much of the Government's argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes at the very constitutional privileges and immunities that are inherent in United States citizenship. It is to be remembered that in our democracy all men are to receive equal and exact justice regardless of their political beliefs or persuasions. The Executive branch of our Government cannot be given the power or the opportunity to investigate and prosecute criminal violations under two different standards simply because an accused espouses views which are inconsistent with our present form of Government.

In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our existing form of Government. If democracy as we know it, and as our forefathers established it is to stand then "attempts of domestic organizations to attack and subvert the existing structure of the Government" (See affidavit of Attorney General), cannot be, in and of itself, a crime. It becomes criminal only where it can be shown that such activity was accomplished through unlawful means, such as invasion of the rights of others, namely through force or violence.

The affidavit of the Attorney General of the United States makes no assertion that at the time these wire-taps were installed; law enforcement agents had probable cause to believe that criminal activity (e.g., the illegal overthrow of the Government through force or violence) was being plotted. Indeed, if such probable

cause did exist, a warrant to search may have properly been issued.

In the opinion of this Court, the contention of the Attorney General is in error; it is supported neither historically, nor by the language of the Omnibus Crime Act. Such power held by one individual was never contemplated by the frame's of our Constitution and cannot be tolerated today. This Court adopts the holding of Judge Warren J. Ferguson in U.S. v. Smith, Criminal. No. 4277-CD, (C.D. Cal., Jan. 8, 1971), which held that:

... in wholly domestic situations there is no national security exemption from the warrant requirement of the Fourth Amendment. Since there is no reason why the Government could not have complied with this requirement by obtaining the impartial judgment of a court before conducting the electronic surveillance in question here, it was obtained in violation of the Fourth Amendment.

This Court hereby ORDERS that the Government make full disclosure to defendant Plamondon of his monitored conversations. The Court, in the exercise of its discretion, further orders that an evidentiary hearing to determine the existence of taint either in the indictment or in the evidence introduced at trial be conducted at the conclusion of the trial of this matter.

DAMON J. KEITH, United States District Judge:

JANUARY 25, 1971.

### APPENDIX C

### IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT No. 71-1105

UNITED STATES OF AMERICA, PETITIONER

United States District Court for the Eastern District of Michigan, Southern Division and Honorable Damon J. Keith, respondent

#### JUDGMENT

In accordance with the opinion this day filed, the Petition for Writ of Mandamus is hereby denied.

Entered by order of the Court.
Judge Weick dissents.

CARL W. REUSS, Clerk.

APRIL 8, 1971.

### APPENDIX D

The Omnibus Crime Control and Safe Streets Act of 1968 provides, in pertinent part (82 Stat. 214, 18 U.S.C. (Supp. V) 2511(3)):

Nothing contained in this chapter or in sec-

tion 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

## FILE COPY

Supreme Court, U.S.

IN THE

JUN 4 1971

# Supreme Court of the United States SEAMER OF

OCTOBER TERM, 1970

WALLEY TO THE

70-153

United States of America,

Petitioner,

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION, and Hon, DAMON J. KEITH.

### BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## Supreme Court of the United States

OCTOBER TERM, 1970

No. 1687

UNITED STATES OF AMERICA,

Petitioner,

United States District Court for the Eastern District of Michigan, Southern Division, and Hon. Damon J. Keith.

### BRIEF IN OPPOSITION TO PETITION FOR A WRIT FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

This case arose out of a criminal proceeding pending trial in the United States District Court for the Eastern District of Michigan in which the three defendants therein are charged with a conspiracy to destroy government property in violation of 18 U.S.C. 371, and one of the defendants, namely, Lawrence Robert "Pur" Plamondon, with the destruction of government property in violation of 18 U.S.C. 1361. On or about October 5, 1970, said defendants moved respondent Hon. Damon J. Keith, United States District Judge for the Eastern District of Michigan, Southern Division, for an order compelling petitioner to disclose to them, inter alia, "any and all logs, records, and memoranda of any electronic or other surveillance directed at any of the defendants herein or at unindicted co-conspirators herein, or conducted at or upon or directed at

premises of any defendant or unindicted co-conspirator herein . . . " On or about December 16, 1970, petitioner filed with Judge Keith a "Memorandum Relating to Electronic Surveillance," accompanied by an affidavit of the Attorney General of the United States, in opposition to defendants' said motion for disclosure of electronic surveillance information. At the same time, petitioner also filed a sealed exhibit containing the records of intercepted conversations of defendant Plamondon, a description of the premises which were the subjects of the surveillances, and copies of the memoranda reflecting the Attorney General's express approval of the surveillances."

In essence, the position of petitioner was that such surveillance was lawful in that the wiretaps which resulted in the overhearings contained in the sealed exhibit "were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domicile organizations to attack and subvert the existing structure. of the Government." (Petition for Writ of Certiorari, p. 12) It was and is petitioner's position that such electronic surveillance is reasonable within the meaning of the Fourth Amendment "when it has been specifically authorized by the President, acting through the Attorney General, to gather intelligence information deemed necessary to protect against attempts to overthrow the Government by force or other unlawful means or against other clear and present dangers to the government's structure or existence." (Ibid., p. 2) In addition, petitioner claimed below that the unrestricted employment of Presidential power to wiretap rested upon the inherent powers of the President as Chief

<sup>\*</sup>This sealed exhibit is part of the record before this Court.

of State to defend the existence of the State (App. A, pp. 35-26), a contention that has apparently now been dropped by the Government.

On January 25, 1971, Judge Keith held that "the contention of the Attorney General is in error; it is supported neither historically, nor by the language of the Omnibus Crime Act. Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today." (App. B, p. 72) Accordingly, Judge Keith ordered the Government "to make full disclosure to defendant Plamondon of his monitored conversations." (Ibid.) On or about February 4, 1971, defendants renewed in writing a motion, orally made in open court a week earlier, to dismiss the indictment on the ground that petitioner had failed to comply with the said order of the district court to disclose the intercepted material. To date, no action has been taken on said motion."

Subsequently, petitioner filed in the United States Court of Appeals for the Sixth Circuit a petition for a writ of mandamus to set aside the said order of the district court requiring "full disclosure to defendant Plamondon of his monitored conversations." While agreeing that the case was an appropriate one for mandamus, the court of appeals, in denying the petition, held "that the district judge properly found that the conversations of defendant Plamondon were illegally intercepted, and we cannot hold that his dis-

This motion was mooted by the subsequent issuance of a stay of execution of Judge Keith's disclosure order, by the court of appeals. Following the denial of petitioner's application for a writ of mandamus, infra, defendants moved for a hearing on and decision of the motion of February 4, 1971, but this motion, too, was at least temporarily mooted on May 10, 1971, by an order of the court of appeals staying its mandate up to and including May 29, 1971.

closure order (as interpreted below) is an abuse of judicial discretion." (App. A, p. 44) On May 8, 1971, the Solicitor General applied for a writ of certiorari to review the said judgment of denial.

Defendants most strenuously oppose the granting of the writ of certiorari sought by petitioner. They do so on the ground that the reasons set forth by the court of appeals in the opinion accompanying its order denying the petition for a writ of mandamus are clearly and consistently correct. As its majority stated in their careful and exhaustive opinion, "we have found no . . . specific constitutional authority to disregard the Fourth Amendment in domestic security cases like this one." (Ibid., at 40).

However, should this Court, in the exercise of its discretion, decide to grant the requested writ of certiorari, defendants request that argument be scheduled during the October Term, 1970. In the event that scheduling difficulties make it impracticable for argument to be heard during said term, it is respectfully urged that this Court convene in Special Term for this purpose. Rosenberg, et al. v. United States, 346 U.S. 273.

In addition to its Fourth Amendment arguments, petitioner raises here for the first time its dissatisfaction with the automatic disclosure requirement mandated by Alderman v. United States, 394 U.S. 165, and suggests that it is "inappropriate and unnecessary in a case such as the present one." (Petition for Certiorari, p. 8) It insists that a defendant's Fourth Amendment rights would be adequately protected by the district court's in camera inspection of unlawful interceptions "to determine whether they are arguably relevant to the prosecution before directing that they be disclosed to the defendant, withholding those that the court can satisfy itself are not arguably relevant. Cf. Taglianetti v. United States, 394 U.S. 316, ibid.," a position expressly rejected by this Court in Alderman.

Defendants make this urgent request because they feel that this "extraordinary case" (App. A, p. 15) contains, as the court of appeals so emphatically stressed "[G]reat issues [which] are at stake for all parties concerned." (Ibid.) But these "great issues" are hardly confined to that "of the President's authority to order warrantless electronic surveillances in national security cases..." (Petition for Certiorari, p. 5) What is really involved here is the startling and horrifying possibility that our national community may be on the verge of rejecting its most fundamental democratic ideals in favor of the fearsome restrictions of a repressive fascist-like state.

On every side, we see the steadily mounting evidence of the impending destruction of those rights and liberties which the Framers were so convinced would create, sustain and perpetuate on these shores a free and open society unlike any other on the face of the globe. The denial of bail, preventive detention, the plethora of "no knock" and stop and frisk" statutes, the apparently unlimited surveillance of everyone from Boy Scouts to Congressmen, the creation and maintenance of millions of dossiers on private citizens, the sanctification of the informer and the infiltrator, the wide use of unprovable and outlandish conspiracy prosecutions, the tacit or active approval of official and private violence against peaceful political dissidents, the vilification of those who dare to differ publicly with their government and the relentless attempts to intimidate and undermine news media critical of its practices and policies-thèse are but a handful of the unmistakable indicia of a nation in the beginning throes of a catastrophic transition from freedom to bondage. No issue could possibly be

greater or of more compelling moment than that of a free people, in fear and desperation, being stampeded into the ready acceptance of the trappings of a totalitarian state with all that tragic designation implies.

Concededly, warrantless electronic surveillance is but one example of the rapidly spreading neo-fascism that is threatening to destroy us as a community of free people. But it illustrates, in dramatic fashion, the spectacle of men in high places vociferously demanding the paradoxical power to save freedom by destroying its most precious concepts. In this area alone, the rampant invasion of our Fourth Amendment safeguards has so seriously shaken the confidence of millions of Americans, be they public or private, in the sanctity of their telephonic communications that no one, consciously or subliminally, can be sure that there is not a third ear present at every such conversation.

Under such circumstances, the free and unrestricted interchange of ideas, the lifeblood of a progressive society, are seriously inhibited and the First Amendment is in great danger of becoming a casualty of the destruction of the Fourth. Only the immediate intervention of this Court can serve notice upon all concerned that this "dirty business" shall cease forthwith and, along with it, every related threat, overt or covert, to the existence of our native as its Founders so fervently envisioned it to be.

It can never be forgotten, even for a moment, that liberty is rarely lost overnight but by the cumulative effect of a succession of disregarded affronts. As one lead-

Or, as the court of appeals put it, "Beyond doubt, the First Amendment is the cornerstone of American freedom. The Fourth Amendment stands as guardian of the First." (App. A, p. 37)

<sup>\*\*</sup> Olmstead v. United States, 277 U.S. 438, 575.

ing newspaper so eloquently and pointedly editorialized in commenting recently on the very issue before this Court, "Tyranny, like fog, can come creeping in on cat's feet. It comes little by little, chipping away at this freedom and chivvying that right. It adopts the habits and practices of a police state while blandly assuring everyone that no police state exists. It intimidates in the name of 'fairness' and denies that conformity and obedience are what are really desired." (The New York Times, May 2, 1971, Section 4, p. 14) To ignore this warning is to court the dark whirlwind that, in 1933, overwhelmed first the Weimar Republic, and then three-quarters of the world.

It hardly seems necessary to point out that the very same "great issues" elaborated below are present in serious federal criminal prosecutions and/or appeals currently pending in other district courts and courts of appeal. In the event of a decision by this Court to review the determination of the court of appeals, it would also seem to be in the best interests of all parties in the within prosecution, so well as in those pending in other jurisdictions, to obtain a swift and final determination of this bedrock issue.

Therefore, the petition for certiorari should be denied or, if granted, this appeal heard and decided during the

<sup>\*</sup>E.g., see, United States v. Dellinger, et al. (CA 7, No. 18,295); United States v. Brown (CA 5, Nos. 26,249 and 30,405); United States v. Smith (CA 9, No. 71-1378); United States v. Ahmad, et al. (M.D. Pa., Ind. No. 14886); and United States v. Marshall, et al. (W.D. Wash., No. 51942). See also the recent decision of the Third Circuit in Egan v. United States, No. 71-1088 (March 2, 1971), review of which will most certainly be sought in this Court.

<sup>\*\*</sup> All of the defendants herein are presently in custody and a swift resolution of this case would, of course, have important ramifications for them.

October Term, 1970, or, in the alternative, at a Special Term of this Court.

Respectfully submitted,

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Dated: June 2, 1971

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# In the Supreme Court of the United States

OCTOBER TERM, 1971

# No. 70-153

United States of America, petitioner

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UNITED STATES DISTRICT COURT FOR THE EASTERN.
DISTRICT OF MICHIGAN, SOUTHERN DIVISION AND
HONORABLE DAMON J. KEITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinions of the court of appeals (App. 33-85) and of the district court (App. 23-32) are not reported.

JURISDICTION

On April 8, 1971, the court of appeals denied the government's petition for a writ of mandamus seeking to compel the respondent district judge to vacate a pretrial order entered in a pending criminal case and the judgment of the court of appeals (App. 87) was entered on that same date. The petition for a writ of certiorari was filed on May 8, 1971, and was granted on June 21, 1971 (App. 88; 403 U.S. 930). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

- 1. Whether electronic surveillance that the Attorney General authorized as necessary to protect the national security is an unreasonable search and seizure solely because it was conducted without prior judicial approval.<sup>1</sup>
- 2. If such national security surveillances are unlawful, whether—notwithstanding Alderman v. United States, 394 U.S. 165—it would be appropriate for the district court to determine in camera whether the interceptions are arguably relevant to the prosecution before requiring their disclosure to the defendant.

# CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The pertinent provisions of the Fourth Amendment to the Constitution and of the Omnibus Crime Control and Safe Streets Act of 1968 are set forth in the Appendix, *infra*.

#### STATEMENT

This case arises from a criminal proceeding, pending trial in the United States District Court for the Eastern District of Michigan, in which the three defendants are charged with conspiracy to destroy government property in violation of 18 U.S.C. 371, and one of the defendants, Plamondon, is charged with destruction of government property in violation of 18 U.S.C. 1361 (App. 5-7). The indictment resulted from the bombing of an office of the Central Intelligence Agency in Ann Arbor, Michigan (App. 6).

<sup>&</sup>lt;sup>1</sup> This statement of the question is a narrowing of, but covered by, the first question presented in the petition.

During pretrial proceedings, the defendants filed a motion for disclosure of electronic surveillance information (App. 8-9, 23). With its response, the government filed and served upon the movants an affidavit of the Attorney General of the United States, acknowledging that government agents had overheard conversations participated in by Plamondon; it also filed the logs of these surveillances as a sealed exhibit (App. 34-35).

The Attorney General's affidavit reads as follows:

JOHN N. MITCHELL being duly sworn deposes
and says:

1. I am the Attorney General of the United States.

2. This affidavit is submitted in connection with the Government's opposition to the disclosure to the defendant Plamondon of information concerning the overhearing of his conversations which occurred during the course of electronic surveillances which the Government contends were legal.

3. The defendant Plamondon has participated in conversations which were overheard by Government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government. The records of the Department of Justice reflect the installation of these wiretaps had been expressly approved by the Attorney Geenral.

4. Submitted with this affidavit is a sealed exhibit containing the records of the inter-

<sup>&</sup>lt;sup>2</sup> The sealed exhibit is part of the record before the Court.

cepted conversations, a description of the premises that were the subjects of the surveillances, and copies of the memoranda reflecting the Attorney General's express approval of the installation of the surveillances.

5. I certify that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court in camera. Accordingly, the sealed exhibit referred to herein is being submitted solely for the court's in camera inspection and a copy of the sealed exhibit is not being furnished to the defendants. I would request the court, at the conclusion of its hearing on this matter, to place the sealed exhibit in a sealed envelope and return it to the Department of Justice where it will be retained under seal so that it may be submitted to any appellate court that may review this matter. [App. 20-21]

On the basis of this affidavit and the sealed exhibit, the government asserted that the surveillances were lawful, though conducted without prior judicial approval, as a reasonable exercise of the President's power (exercised through the Attorney General) to utilize the investigative resources at his disposal to secure the intelligence necessary for the preservation of the national security (App. 25).

The district court (Judge Keith) rejected this argument, and held that the surveillance, because it had not received prior judicial sanction, violated the Fourth Amendment (App. 23-32). It ordered the

government to make full disclosure to Plamondon of his overheard conversations as a necessary prelude to an evidentiary hearing at the conclusion of the trial to determine whether any of the evidence con which the indictment was based or which the government intends to offer at trial is "taint[ed]" by the surveillance (App. 32).

The government then filed in the court of appeals a petition for a writ of mandamus to set aside this order. The court of appeals denied the petition (App. 68). It agreed that the case was an appropriate one for mandamus, since the order was not appealable and raised "[g]reat issues \* \* \* for all parties concerned" which were of first impression in any appellate court (App. 39). On the merits, the court (Judge Weick dissenting) held that the district court had properly found the surveillances unlawful under the Fourth Amendment, and had properly required disclosure of the overheard conversations (App. 40-64). The court rejected the government's alternative argument that even if the surveillances were illegal, the special circumstances of this case made appropriate an incamera determination, without disclosure to the defendant, of its contention that the conversations intercepted were irrelevant to the prosecution (App. 64 68).

#### SUMMARY OF ARGUMENT

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The Fourth Amendment does not prohibit all searches and seizures without a warrant, but only unreasonable ones. The determination whether a par-

ticular search is reasonable requires "balancing the need to search against the invasion which the search entails." Camara v. Municipal Court, 387 U.S. 523, 537. We submit that an electronic surveillance authorized by the Attorney General as necessary to protect the national security is not an unreasonable search and seizure solely because it is conducted without prior judicial approval.

The President, as chief executive, is responsible for assuring that our system of government is a functioning, viable entity, and for safeguarding it against overthrow by unlawful means. As this Court has recognized, proper performance of this duty requires that the President have complete information concerning actual and potential threats to national security. For the past 30 years Presidents have authorized electronic surveillance in national security cases without a warrant, and the need therefor is equally great today.

In authorizing such surveillances, the Attorney General properly acts for the President. The standard the Attorney General applies is that Congress provided in the Omnibus Crime Control and Safe Streets Act of 1968. The Attorney General's authorization is subject to judicial review, to assure that his determination to make the surveillance was not arbitrary and capricious.

Requiring a warrant for national security electronic surveillance would frustrate the governmental purpose behind the surveillance. To obtain a warrant, the government would have to disclose sensitive and highly secret information, which would significantly re-

duce the chances of the surveillance being effective. Moreover, in determining whether a warrant should issue, a judge would be called upon to perform a function outside the traditional judicial responsibilities; the need for intelligence gathering ordinarily involves consideration of a large number of complicated facts and subtle inferences. Allowing the Attorney General to authorize such surveillances without prior approval by a magistrate would centralize responsibility on this matter, thereby promoting uniformity in the standards governing them and facilitating close control of use of this investigative technique.

The legislative history of the Omnibus Crime Control and Safe Streets Act of 1968 indicates that in excepting national security surveillances from the Act's warrant requirement Congress recognized the President's authority to conduct such surveillances without prior judicial approval. Moreover, a warrant is not required for surveillances conducted to gather foreign intelligence information. The reasoning that supports this conclusion applies equally to all national seurity matters: all such matters involve highly complex factors that make judicial scrutiny impracticable and no clear distinction can be drawn between foreign and domestic threats to the national security, as Congress itself has recognized in the 1968 Act. Finally, the possibility that the Attorney General might abuse his power to authorize surveillances of this sort is not a valid basis for denying him that power, since his acts would be subject to judicial review to protect against abuse.

If national security surveillances conducted without a warrant are, contrary to our contention, unlawful, we urge that the Court reconsider the automatic disclosure rule of Alderman v. United States, 394 U.S. 165. We submit that in this area courts should be permitted to make an initial in camera determination whether the information obtained by the surveillance is arguably relevant to a prosecution before turning the material over to a defendant.

Disclosure of overheard conversations has a serious potential for injury, to persons whose innocent conversations were overheard, to third persons mentioned in such conversations, to informants and their families, and to pending investigations and prosecutions. Moreover, as in this case, the defendant to whom disclosure must be made frequently is not the subject of surveillance and his overheard conversation bears no relation to his prosecution. The problems of automatic disclosure are especially troublesome in the national security area, where secrecy is essential to the success of the government's intelligence gathering operations. Automatic disclosure for national security cases would require the government to face an undesirable dilemma: either to drop the prosecution of an often serious crime or to reveal sensitive secret information.

The Alderman rule is most reasonably viewed as an exercise of the Court's supervisory powers. Congress has rejected automatic disclosure in favor of a more flexible approach in the Omnibus Crime Control and

Safe Streets Act of 1968, because of the special dangers that disclosure entails and because protective orders had proved insufficient to cope with those dangers. We believe that this enactment supplants the rule of Alderman in the circumstances to which it applies, and indicates a congressional intent that in the national security area, which the Act specifically excepts from its coverage, the Alderman rule should not be applied to interceptions after its effective date. This view is strengthened by the legislative history of Title VII of the Organized Crime Control Act of 1970, in which Congress explicitly o overturned the Alderman rule for all cases arising prior to the effective date of the 1968 Act. In light of the strongly expressed congressional view that automatic disclosure is undesirable and not constitutionally required, we submit that that rule should not apply to the national security area.

#### ARGUMENT

#### I.

AN ELECTRONIC SURVEILLANCE THAT THE ATTORNEY GENERAL HAS AUTHORIZED AS NECESSARY TO PROTECT THE NATIONAL SECURITY IS NOT AN UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT SOLELY BECAUSE IT IS CONDUCTED WITHOUT PRIOR JUDICIAL APPROVAL

#### INTRODUCTION

The constitutional issue before the Court, although of great importance, is narrow: whether the fact that there has been no prior judicial approval of an electronic surveillance that the Attorney General has authorized as necessary to protect the national security necessarily and on that ground alone converts the surveillance into an unreasonable search and seizure that violates the Fourth Amendment. The government makes no claim that such authorization by the Attorney General itself establishes compliance with the Fourth Amendment standard of reasonableness; it urges the Court only to hold that the absence of prior judicial approval does not invalidate the search under that standard.

As we explain below (pp. 21-23), we recognize that the courts properly may review the action of the Attorney General in authorizing such surveillance. We argue, however, that the scope of such review is necessarily extremely limited, and that great deference must be given to the Attorney General's judgment that a particular surveillance is necessary to protect the national

security.

There is no issue here of the authority of the government to engage in sweeping electronic surveillance without prior judicial approval as a general law enforcement technique. The government claims no authority to do that. Nor does it urge a broad definition of "national security" that could cover many or most criminal investigations. The standard it proposes here is the same standard that Congress adopted in the Omnibus Crime Control and Safe Streets Act of 1968, in authorizing electronic surveillance without a warrant. See, infra, pp. 20-21.

This Court has expressly left open the question

"[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security \*" (Katz v. United States, 389 U.S. 347, 358, n. 23: see Giordano v. United States; 394 U.S. 310, 314-315). We urge the Court to adopt the principle that Mr. Justice White suggested in his concurring opinion in Katz (389 U.S. at 364): "We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." That rule, we submit, properly would effectuate the basic. principle that the Fourth Amendment prohibits only "unreasonable" searches and seizures, and would accord with the decisions of this Court defining the protection which that Amendment was intended to provide against arbitrary governmental invasions of "the right to be let alone" (Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 478, quoted with approval in Stanley v. Georgia, 394 U.S. 557, 564).

A. The Determination Whether a Search and Seizure is Reasonable Under the Fourth Amendment Requires a Weighing of the Competing Interests Involved.

"[T]here can be no ready test for determining reasonableness [under the Fourth Amendment] other than by balancing the need to search against the invasion which the search entails" (Camara v. Munici-

pal Court, 387 U.S. 523, 536-537). The Fourth Amendment does not forbid all searches and seizures without a warrant, since there is no constitutional requirement that there must always be judicial authorization before a search or seizure can be made.

The authority of the government to conduct searches without a warrant in certain situations is well established. Thus, customs agents have the right to search persons and their property at the border and without needing probable cause to believe that they are committing a crime. See Boyd v. United States, 116 U.S. 616, 623; Alexander v. United States, 362 F. 2d 379 (C.A. 9), certiorari denied, 385 U.S. 977; United States v. Johnson, 425 F. 2d 630 (C.A. 9); Walker v. United States, 404 F. 2d 900 (C.A. 5). The government similarly may search persons entering government buildings. See Barrett v. Kunzig, civ. No. 6193, M.D. Tenn., decided August 11, 1971, infra, n. 6. Finally, searches without a warrant have been upheld where, as here (see infra, p. 19), they were not related to a criminal investigation. Abel v. United States, 362 U.S. 217; see, also Wyman v. James, 400

See, e.g., Carroll v. United States, 267 U.S. 132; McDonald v. United States, 335 U.S. 451; Schmerber v. California, 384 U.S. 757; Cooper v. California, 386 U.S. 58; Warden v. Hayden, 387 U.S. 294; Terry v. Ohio, 392 U.S. 1; Chimel v. California, 395 U.S. 752; Chambers v. Maroney, 399 U.S. 42; Wyman v. James, 400 U.S. 309, 318-324. The seizure of contraband goods under civil process is not subject to the warrant requirement of the Fourth Amendment. Boyd v. United States, 116 U.S. 616; Murray's Lessee v. Hoboken Land and Improvement Co., 18 Howard 272. Nor is it required that every search that yields evidence of criminal conduct be supported by a prior warrant. Abel v. United States, 362 U.S. 217.

U.S. 309, 318-324. The government's contention that a warrant is not required for the particular type of search in this case accordingly involves no novel principle of constitutional law, but rather the application to these facts of existing doctrine.

Thus, the fact that the surveillance in this case was done without a warrant does not automatically make the search and seizure unreasonable. "[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (Terry v. Ohio, 392 U.S. 1, 19).

Furthermore, we think that in balancing the competing interests involved the degree of invasion that the particular search and seizure produces must be taken into account. Cf. Terry v. Ohio, supra. The overhearing of a telephone conversation—and particularly where, as here, the speaker's own telephone has not been tapped but the overhearing results from his telephone call to a number that is under surveillance (see pp. 30-31, n. 13, infra)—involves a lesser invasion of privacy than a physical search of a man's home or his person. While such surveillance is subject to the Fourth Amendment (Katz v. United States; supra), the determination of its reasonableness properly should take cognizance of the extent of the invasion of privacy involved.

The electronic surveillance in this case was made, as we develop in the next point of this brief, in order to gather intelligence information that the Attorney General, acting on behalf of the President, concluded was necessary to protect the national security. The

governmental interest in this case, therefore, is not merely law enforcement, important as that obviously is, but protection of the fabric of society itself. "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses" (Cox v. New Hampshire, 312 US. 569, 574). Morgover, "[i]n determining whether a particular inspection [or search] is reasonable " " the need for inspection [or search] must be weighed in terms of these reasonable [governmental] goals " " (Camara v. Municipal Court, supra, 387 U.S. at 535). Cf. Anderson v. Sills, 56 N.J. 210, 226, 229, 265 A. 2d 678, 687, 688.

As the Court also pointed out in Camara, "[i]n assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is hikely to frustrate the governmental purpose behind the search" (387 U.S. at 533). Though the general rule may be that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment" (Katz v. United States, supra, 389 U.S. at 357), exceptions do exist. See supra, p. 12. As we now show, "the governmental purpose behind the search" is a proper one, and that purpose "is likely to [be] e tiational security.

frustrate[d]" by imposing a warrant requirement for surveillance in national security cases (Camara, supra, 1387 U.S. at 533).

B. When the Governmental Interest in Protecting National Security is Balanced Against the Invasion of Personal Rights Resulting from Electronic Surveillance, the Proper Conclusion is That a Warrant is not Required Before Such Surveillance may be Made.

1. The President has a duty to protect the national security and he hasauthority to gather intelligence information necessary to perform that function.

A fundamental right of any society is to preserve itself and to maintain its government as a functioning and effective organism. Article II, Section 1 of the Constitution vests the executive powers in the President and requires him to preserve, protect and defend the Constitution and the government created by it. As chief executive, the President is responsible for insuring that our system of government functions as a viable entity. Implicit in that duty is protecting the existing system of government against overthrow by unlawful means and assuring that the government can function effectively.

In fulfilling this responsibility, the President must exercise an informed judgment. This in turn requires that all pertinent information be readily available to him. This is particularly important with respect to his obligation to protect the government from unlawful overthrow, since he cannot remain passive until there may be actual acts of insurrection or sabotage. Instead, the President must be able to collect in ad-

vance and on a continuing basis the information he needs to protect the government against destruction or such weakening as renders it impotent to function. This gathering of information is not undertaken for prosecution of criminal acts, but rather to obtain the intelligence data deemed essential to protect the national security. The distinction between the collection of intelligence information to protect the national security and a search made in connection with a criminal investigation has been recognized by Congress in the Omnibus Crime Control and Safe Streets Act of 1968, discussed infra, pp. 20-21.

This Court has recognized the President's authority and duty to collect and utilize intelligence information so that he can properly fulfill his constitutional responsibilities. In Totten v. United States, 92 U.S. 105, the Court noted that the President "was undoubtedly authorized during the [civil] war, as commander in chief of the armies of the United States, [to] obtain [intelligence] information." It noted further that the nature of that Presidential responsibility required that both the type of intelligence gathering technique employed and the fact that such technique was being employed not be made public (92 U.S. at 106-107).

Presidentially-authorized surveillance in national

See, e.g., In re Debs, 158 U.S. 564, Oetjen v. Central Leather Co., 246 U.S. 297; United States v. Curtiss-Wright Corp., 299 U.S. 304, 320-321; United States v. Belmont, 301 U.S. 324; United States v. Pink, 315 U.S. 203; Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 4111; Cafeteria Workers v. McElroy, 367 U.S. 886.

security cases involving threats to overthrow or subvert the government by unlawful means has been undertaken by successive Presidents over a period of thirty years. In 1940, President Roosevelt notified Attorney General Jackson by confidential memorandum of the necessity to utilize wire-tapping in matters "involving the defense of the nation," and directed him "to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of subversive activities against the Government of the United States \* (App. 69). Attorney General Clark in 1946 advised President Truman of this earlier directive, and recommended that "in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. \* \* \* While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to use them in cases vitally affecting the domestic security \* \* \*." President Truman explicitly concurred in the recommended policy (App. 70-71). Later Presidents have adhered to this policy (e.g., memorandum from President Johnson acknowledging "that mechanical and electronic [surveillance] devices may some-

<sup>&</sup>lt;sup>5</sup> See generally Brownell, The Public Security and Wire Tapping, 39 Cornell L. Q. 195, 199-200 (1954); Rogers, The Case for Wire Tapping. 63 Yale L.J. 792, 795-796 (1954).

times be essential in protecting our national security" (App. 71)). The exercise of this power for 30 years itself supports its existence, since "in determining the.\* \* \* existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation" (United States v. Midwest Oil Co., 236 U.S. 459, 473).

The need for these investigative measures in national security cases continues to the present. In the last several years the number of acts of sabotage against the government has increased at an alarming rate. The President must protect the government—and thereby the society for whose benefit it exists—and proper performance of this function still requires, as it has in the past, the occasional use of electronic

ened to use force and other illegal means to attack and subvert the government and have committed many violent acts to accomplish this end. Because of this, both state and federal officials frequently found it necessary to station guards at entrances to government buildings and to inspect and search packages brought into the buildings. The authority to conduct such inspections and searches without a warrant was recently upheld in *Barrett* v. *Kunzig*, Civ. No. 6193, M.D. Tenn., decided August 11, 1971.

r See Staff Study of Bombings in the United States, January 1, 1969 through July 1, 1970, Exhibit 825 to the Hearings before the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations on Rials and Civil and Criminal Disorder, Part 25, 91st Cong., 2d Sess. (1970). Statistics from the National Bomb Data Center indicate that, in the twelve month period from July 1, 1970, to July 1, 1971, there were 3,285 bombings in the United States, most of which involved government-related facilities. Statistics, National Bomb Data Center, Management and Research Division, International Ass'n of Chiefs of Police (1971).

surveillance to gather information concerning the plans of those who have committed themselves, in many instances publicly, to engage in covert, terrorist tactics to destroy and subvert the government.

- 2. The Attorney General, acting on behalf of the President, may authorize surveillance in national security cases.
- a. In authorizing such surveillance the Attorney General properly acts on behalf of the President. The President, of course, cannot himself directly do all of the acts involved in the performance of his constitutional functions. Necessarily, he must delegate many of them—particularly those that involve detailed work requiring a large group of experts—to those of his subordinates who are best able to perform the job. The President has given the responsibility to act for him in gathering domestic intelligence information to the government's chief legal officer, the Attorney General.

We stress once again that, in conducting such national security surveillances, the Attorney General is gathering intelligence information for the President, not obtaining evidence for use in criminal prosecution. As noted above (supra, p. 12), there may be less need for a warrant where the purpose of the search is not criminal investigation.

The Attorney General properly acts for the President in this area. It is well settled that "[e]ach head

<sup>&</sup>lt;sup>8</sup> That fact distinguishes the present case from *Coolidge* v. *New Hampshire*, 403 U.S. 443, where the warrant was issued to obtain information for a subsequent criminal prosecution.

of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority." Myers v. United States, 272 U.S. 52, 133; Knauff v. Shaughnessy, 338 U.S. 537; see, also, Brownell v. Rasmussen, 235 F. 2d 527 (C.A.D.C.), certiorari dismissed, 355 U.S. 859. Cf. Katz v. United States, 389 U.S. 347, 364 (Mr. Justice White, concurring). Thus, in determining the reasonableness under the Fourth Amendment of national security surveillances made without a warrant, the governmental authority involved is that of the President.

b. The standard of national security that the Attorney General applies is the same standard Congress provided in the Omnibus Crime Control and Safe Streets Act of 1968. The standard of the national security that the Attorney General applies in author-, . izing electronic surveillance without a warrant is the same standard that Congress provided in the Omnibus Crime Control and Safe Streets Act of 1968. In that Act, Congress exempted from the warrant requirements (which it provided for electronic surveillance in connection with criminal investigations) five categories, with respect to which the Act does not limit "the constitutional power of the President to take such measures as he deems necessary to protect" the United States. Three of these categories relate to the hostile acts of a foreign power and to foreign intelligence activities and are not directly involved here. But see infra, pp. 30, 34. The two other categories are to protect the United States against the overthrow

of the Government by force or by other unlawful means, or against any other clear and present danger to the structure or existence of the Government" (18 U.S.C. 2511(3)).

These were the grounds upon which the Attorney General authorized the surveillance in the present case. As his affidavit stated (App. 20), the wiretaps "were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government."

c. The Attorney General's action in authorizing the surveillance is subject to limited judicial review. We make no contention that the Attorney General's action in concluding that a particular surveillance is necessary to protect the national security is immune from judicial review. Once the surveillance has been made, the courts may review it to determine its conformity with the standard of the Fourth Amendment, just as they review any other search and seizure that is challenged in the criminal proceeding by a motion to suppress or an objection to evidence. Indeed, that was the procedure that the defendants followed in the present case, when shortly after the indictment they moved to compel the government to disclose the information it had obtained through electronic surveillance.

Normally, such judicial review would not take place until a criminal prosecution has been initiated—and, of course, most national security electronic surveillances do not result in prosecutions. The point at which it would be made—whether at the outset of the proceeding, or later on—lies in the discretion of the trial court.

In determining the validity of the surveillance under the Fourth Amendment standard of reasonableness, the scope of judicial review should be extremely limited. Unless it appears that the Attorney General's determination that the proposed surveillance relates to a national security matter is arbitrary and capricious, i.e., that it constitutes a clear abuse of the broad discretion that the Attorney General has to obtain all information that will be helpful to the President in protecting the government against "overthrow" \* \*\* by force or other unlawful means or against any other clear and present danger to [its] structure or existence" (Omnibus Crime Control and Safe Streets Act of 1968), the court should sustain it. The court should not substitute its judgment for that of the Attorney General on whether the particular organization, person or event involved has a sufficient nexus to protection of the national security to justify the surveillance.

The judgment involved in determining whether to authorize a particular surveillance depends upon such a wide variety of facts and considerations, many of which involve information that necessarily must be kept confidential (see *infra*, pp. 24–26), that the courts rarely would be able to make an informed judgment on the necessity for the particular inquiry. The nature of the gathering of national security intelligence information makes inappropriate any attempt by the

courts to review the need or wisdom for a particular surveillance. The traditional standard of probable cause would be wholly inappropriate for testing the reasonableness under the Fourth Amendment of this category of search and seizure. See *United States* v. White, 401 U.S. 745, 782–783, n. 19 (Mr. Justice Harlan, dissenting).

Moreover, in view of the extremely sensitive nature of the President's actions and decisions in the area of national security and the interrelationship that frequently exists between domestic and foreign intelligence (see infra, pp. 24-25, 34), we urge that such judicial review of the legality of the surveillance may "appropriately be made in ex parte, in camera, proceedings" (Giordano v. United States, supra, 394 U.S. at 314, Mr. Justice Stewart, concurring)—as the government proposed in the present case. The material considered in such in camera proceeding would, of course, be available under the same restriction to the appellate courts. (We also urge, see Point II of the brief, that if surveillance is determined to be - illegal, an initial determination of arguable relevance to the prosecution should be made in camera.).

- 3. The Fourth Amendment Does not Require a Warrant for a National Security Electronic Surveillance That the Attorney General has Authorized.
- a. Requiring a warrant in national security electronic surveillance is likely to frustrate the governmental purpose of such surveillance. "[W]hether the authority to search should be evidenced by a warrant \* \* \* depends in part upon whether the burden

of obtaining a warrant is likely to frustrate the governmental purpose behind the search" (Camara v. Municipal Court, 387 U.S. 523, 533). Requiring a warrant for electronic surveillance would seriously handicap the ability of the government to obtain vital information relating to national security.

In deciding to use surveillance in such cases, the Attorney General has available and relies upon the entire spectrum of information available to the President. Much of it is derived from sources and involves matters which, by their nature, are highly confidential and must be kept secret. Disclosure to a magistrate of all or even a significant portion of the information and policy considerations the Attorney General weighed in reaching his decision would create serious potential dangers to the national security and to the lives of informants and agents. Without such information, however, the magistrate could not properly perform his traditional function in determining whether the government had a sufficient basis to justify the issuance of a warrant. In order to obtain a warrant, the government would have to show the need for the surveillance by producing information concerning its proposed subject which would entail disclosure of important intelligence information and its sources.

Disclosure of the reasons for a surveillance or even that it is to be conducted could, because of the sensitive nature of the information sought and of most surveillance targets, make an effective surveillance impossible and thus prevent the government from obtaining vital information. Secrecy is the essential ingredient in intelligence gathering; requiring prior judicial authorization would create a greater "danger of leaks \* \* \*, because in addition to the judge, you have the clerk, the stenographer and some other officer like a law assistant or bailiff who may be apprised of the nature" of the surveillance. Brownell, The Public Security and Wire Tapping, 39 Cornell L. Q. 195, 210 (1954).

Requiring a warrant for national security surveillance would compel the judiciary to embark upon a far different kind of inquiry than courts now make in considering an application for a warrant. In the usual law enforcement situation, the police officer who comes before the magistrate seeking a warrant is able to rely upon a small number of simple facts to indicate probable cause to believe that a crime has been committed at a particular place or by a particular person. In national security surveillance cases, however, the justification for the surveillance ordinarily cannot be simply stated or easily demonstrated; generally it involves a large number of detailed and complicated facts whose interrelation may not be obvious to one who does not have extensive background information, and the drawing of subtle inferences. Moreover, unlike the traditional searches made pursuant to warrants that magistrates issue upon a showing of probable cause, national security surveillances are not designed to obtain facts needed in a criminal investigation, but to obtain intelligence information. Such surveillances involve matters outside the "experience

or facilities" of the judiciary; "[t]he investigative issues do not lie within traditional judicial expertise; they are intrinsically police problems, and should be handled by the executive branch." Telford Taylor, Two Studies in Constitutional Interpretation, 89 (1969).

Thus, requiring a warrant frequently would compel the Attorney General to choose between either disclosing to a magistrate highly sensitive information that in the opinion of the government's chief law officer should be kept confidential, or foregoing the use of a proven effective method of gathering intelligence information necessary to the national security. Whatever course the Attorney General followed in that situation would be inimical to the national interest. The governmental objective here is of grave importance, and the Constitution should not be construed to "withdraw from the Government the power to safeguard its vital interests" in the area. United States v. Robel, 350 U.S. 258, 267; see also Aptheker v. Secretary of State, 378 U.S. 500, 509.

Permitting the Attorney General to authorize national security surveillance without first obtaining approval of a magistrate would serve the desirable

fraction, and take a

See the report of William H. Crouch, Chief, American-British law Division of the Library of Congress, in Wiretapping, Eavesdropping, and the Bill of Rights, the Hearings pursuant to S. Res. 234, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., 137 et seq. (1958).

objective of promoting uniformity in the standard governing such surveillances, since a single individual rather than a large number of judges would make the determination.10 Centralized responsibility also would permit greater control over use of this technique by facilitating close congressional oversight of the Executive's action." See Telford Taylor, supra, at 90. Great Britain has made the same judgment. In 1957 it rejected a proposal to substitute prior judicial authorization of surveillance for the then existing system of permitting the executive branch, acting alone, to do

See also the statement of Atterney General Brownell in Wiretapping, Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 762, 867, 4513, 4728, and

5096, 84th Cong., 1st Sess., 31-32 (1955).

<sup>10</sup> The Attorney General personally authorizes each national security surveillance, and does so only when he concludes that the information to be obtained thereby is essential to the protection of the government. One result of this careful and personal review by the Attorney General is that the number of such surveillances is closely limited; indeed, in recent years it has significantly declined. The number of warrantless "national security" telephone surveillances operated by the Federal Bureau of Investigation in the past ten years has decreased: 1960-78; 1961-90; 1962-84; 1963-95; 1964-64; 1965-44; 1966-32; 1967-38; 1968-33; 1969-49; 1970-36. See, e.g., Hearings before a Subcommittee of the Committee on Appropriations of the House of Representatives, 87th Cong., 2d Sess. 345 (January 22, 1962); Hearings before a Subcommittee of the Committee on Appropriations of the House of Representatives, 88th Cong., 1st Sess. 491 (January 29, 1963); Hearings before s Subcommittee of the Committee on Appropriations of the House of Representatives, 91st Cong., 2d Sess. 754 (February 17, 1970).

so, because the latter method offered better control and greater uniformity."

b. Congress has recognized the President's authority to authorize national security electronic surveillance without a warrant. As we have noted (supra, pp. 20-21), in the Omnibus Crime Control and Safe Streets Act of 1968 Congress excepted from the requirement that a warrant be obtained for electronic surveillance certain categories of cases dealing with foreign and domestic intelligence and security. It provided that nothing in that Act shall "limit the constitutional power of the President to take such measures as he deems necessary to protect" the country in those areas. The court of appeals viewed this provision as "completely neutral" on the issue of the President's authority to conduct such surveillance (App. 57). We submit, however, that the legislative

<sup>&</sup>lt;sup>12</sup>In 1957, a committee of three Privy Councillors was appointed to study the Home Secretary's practice of authorizing electronic surveillance, both in ordinary criminal cases and in national security situations. In its report to the Prime Minister and Parliament, the committee discussed alternatives that had been proposed (Report of the Committee of Privy Councillors Appointed to Inquire Into the Interception of Communications, paras. 85, 86 (1957)):

It has been urged in some quarters that the authority for the issue of warrants for interception should not be left exclusively in the hands of the Secretary of State. The chief suggested alternatives that have come to our attention are that the Home Secretary should be assisted by an Advisory Committee or that warrants should be issued only on a sworn information before magistrates or a High Court judge. In our opinion, neither of these proposals would improve matters. If a number of magistrates or judges had the power to issue such warrants, the control of the use to which methods of interception can be put would be weaker than under the present system. It might very well prove easier in practice to obtain warrants.

history reflects a Congressional recognition of the existence of that authority.

The Senate Committee Report explained this provision as follows (S. Rept. No. 1097, 90th Cong., 2d Sess. 94 (1968)):

These provisions of the proposed chapter regarding national and internal security thus provide that the contents of any wire or oral communication intercepted by the authority of the President may be received into evidence in any judicial trial or administrative hearing. The only limitations recognized on this use is that the interceptions be deemed reasonable based on an ad hoc judgment taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself (Carroll v. United States, 267 U.S. 132 (1925)). The possibility that a judicial authorization for the interception could or could not have been obtained under the proposed chapter would only be one factor in such a judgment. No preference should be given to either alternative, since this would tend to limit the very power that this provision recognizes is not to be deemed disturbed.

Congress thus "recognize(d)" that the President's "power" to authorize "interceptions" of "any wire or oral communication" involving "national and internal security"—which the Attorney General exercises on behalf of the President—"is not to be deemed disturbed."

c. The considerations involved in authorizing national security surveillance are so interrelated to those

involved in conducting foreign intelligence operations. and the two activities are so interrelated, that it would be inappropriate to impose stricter standards for the former than for the latter. In rejecting the government's contention that the electronic surveillance here involved did not require a warrant, the district court and the court of appeals placed considerable emphasis on their view that this case involves only domestic and not foreign security problems (e.g., App. 30-31, 47, 51, 63-64). Implicit in this analysis is the recognition that a warrant would not be required for surveillance involving foreign intelligence operationsas the Court of Appeals for the Fifth Circuit recently held in United States v. Clay, 430 F. 2d 165, certiorari granted and reversed on another issue, 403 U.S. 698, discussed infra, pp. 32-33. We think that the suggested distinction is insupportable, both on the facts of this case 13 and in most (if not all) national

We think these records demonstrate that any characterization

<sup>&</sup>lt;sup>13</sup> The defendant, Plamondon, was not the subject of the surveillance in question (App. 35, 74). As shown in the sealed exhibit filed in the district court, the surveillance was directed to a wholly independent organization, of which Plamondon was not a member, on the basis of information available to the Attorney General from other intelligence operations. Plamondon was overheard during conversations with this organization.

We have lodged with the Clerk of this Court for its in camera consideration the same exhibit we submitted to the Court of Appeals for the Ninth Circuit in the Ferguson case, which involves the same issue as the present case and is now pending on a petition for a writ of certiorari. Ferguson v. United States, No. 71-239. That exhibit consists of additional record of conversations overheard during this surveillance.

security cases within the congressionally defined areas of concern. Foreign and domestic intelligence activities are interrelated aspects of the broad function of protecting national security.

This Court has recognized the broad discretion of the President in the conduct of foreign affairs, and the inappropriateness of judicial reconsideration of his decisions in that field, which necessarily rest upon confidential information whose disclosure would be detrimental to the national interest. United States v. Curtiss-Wright Export Corp., 299 U.S. 304; Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103. In holding in Waterman that orders of the Civil Airlines Board awarding overseas airline routes after approval by the President were not subject to judicial review, the Court stated (333 U.S. at 111):

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports aronot and ought not be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit in camera in order to be taken into executive confidences. But even if courts could

of the organization in question as "domestic" is unsupportable. For example, over a fourteen month period, 521 telephone calls were made from this installation to foreign and overseas installations and another 431 calls, the contents of which deal with foreign subject matter, were placed to domestic installations.

require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political deapartments of the Government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry

Similar considerations recently led the Court of Appeals for the Fifth Circuit to uphold a wiretap (designated as the fifth) that had "been authorized by the Attorney General, for the purpose of obtaining foreign intelligence information" and made without a warrant. United States v. Clay, 430 F. 2d 165, 170, reversed on another issue, 403 U. S. 608. The court explained (430 F. 2d at 171):

Determination of this case requires that we balance the rights of the defendant and the national finterest. The Attorney General, who acts

The Court has recognized that judicial review of the President's action is equally inappropriate in other matters committed to his discretion. See, e.g., Prize Cases, 2 Black 635; Octjen v. Central Leather Co., 246 U.S. 297; Dakota Central Telephone Co. v. South Dakota, 250 U.S. 163; United States v. Belmont, 301 U.S. 324, 328; United States v. Pink, 315 U.S. 203; Johnson v. Eisensrager, 339 U.S. 763, 789; United States v. Hogans, 369 F. 2d 359 (C.A. 2).

here for the President and Commander-in-Chief. has submitted his affidavit that the fifth wiretap was maintained "for the purpose of gathering foreign intelligence information" and the Attorney General opposed disclosure at the hearing because "it would prejudice the national interest to disclose particular facts concerning this surveillance other than to the court." The fifth log was submitted by the Government for an in camera examination by the Court, which has been made both here and in the District Court. The rights of defendant and the national interest have thus been properly safeguarded. Further judicial inquiry would be improper and should not occur. It would be "intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111, 68 S. Ct. 431, 436, 92 L.Ed. 568 (1948). We, therefore, discern no constitutional prohibition against the fifth wiretap.15

The reasoning that upholds the power of the Attorney General, exercising the power of the President, to authorize electronic surveillance without a warrant for the gathering of foreign intelligence information is equally applicable to domestic national security matters. In both situations the determination to undertake surveillance requires the evaluation of a multitude of subtle and complicated facts and

<sup>&</sup>lt;sup>15</sup> See also United States v. O'Baugh, 304 F. Supp. 767 (D. D.C.); United States v. Stone, 305 F. Supp. 75 (D. D.C.); United States v. Butenko and Ivanov, No. 418-63, D. N.J., decided October 13, 1970; United States v. Dellinger, et al., Cr. 69-180, N. D. Ill., E.D., decided February 20, 1970.

considerations whose very nature requires that they not be made public, and which are not appropriate for judicial scrutiny. See, *supra*, pp. 24-26.

Moreover, no sharp and clear distinction can be dfawn between "foreign" and "domestic" information. The line between them frequently blurs and overlaps, and a surveillance that originally involved foreign intelligence information may quickly extend to domestic activity and vice versa. Organizations that appear to be wholly domestic may in fact have significant foreign ties, as may American nationals connected with such organizations. To attempt to compartmentalize national security into rigid separate segments of "foreign" and "domestic" ignores the realities of the way in which many organizations and individuals whose activity must be kept under surveillance to protect national security operate, and the manner in which intelligence operations must be conducted.

Congress itself has recognized in the Omnibus Crime Control and Safe Streets Act of 1968 that foreign and domestic intelligence activities are overlapping and interrelated. It excepts five general categories of matters from the requirement that a warrant be obtained for electronic surveillance. Three of them relate to foreign intelligence." and two to internal security.

<sup>16</sup> These three categories are (18 U.S.C. 2511(3)):

to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. \* \*

d. The possibility that the Attorney General could abuse his power to authorize national security electronic surveillance without a warrant is not a valid reason for denying him that power. The court of appeals was apparently concerned that if the Attorney General has the power to authorize national security electronic surveillance without a warrant, he could abuse that power (App. 60-61). But any power that a government official possesses is subject to abuse, and that possibility is not a valid reason to deny him the power.

The Attorney General's determination to authorize surveillance is, as we recognize (supra, pp. 21-23), subject to judicial review, although of limited scope. If the Attorney General should ever abuse his authority in authorizing a surveillance, i.e., if the subject of surveillance bore no reasonable relation to national security, the courts could correct the situation. The possibility of such an abuse, however, is not a valid basis for denying the Attorney General the authority.

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IF IT IS DETERMINED THAT ELECTRONIC SURVEILLANCE TO PROTECT NATIONAL SECURITY IS UNLAWFUL IN THE ABSENCE OF PRIOR JUDICIAL AUTHORIZATION, COURTS SHOULD BE PERMITTED TO DETERMINE IN CAMERA WHETHER ILLEGAL INTERCEPTIONS ARE ARGUABLY RELEVANT TO A PROSECUTION BEFORE REQUIRING THEIR DISCLOSURE TO THE DEFENDANT

If this Court should conclude, contrary to the position urged in Point I of this brief, that electronic surveillance to protect the national security requires prior judicial authorization, then we urge that it reconsider Alderman v. United States, 394 U.S. 165, and hold that the requirement of automatic disclosure of interceptions to defendants announced in that case is inapplicable to this kind of surveillance. When interceptions are made for national security purposes, the reasons are especially strong for permitting courts to determine in camera whether the information obtained thereby is arguably relevant to a presecution before turning the material over to a defendant; and courts should be permitted to make an initial determination in camera with respect to these interceptions,

We recognize that Alderman appears to require automatic disclosure for every circumstance in which there is an unlawful interception of a defendant's voice, but reconsideration is appropriate in this context for a number of reasons. The majority opinion in that case does not state that the issue of automatic disclosure versus an initial in camera proceeding can be decided by easy reference to some constitutional text. Rather, it rests on the premise that the issue must be determined on the basis of a balancing of the defendant's interest in adequate protection of his rights against the reasons for not disclosing material that does not appear arguably relevant. Subsequent to Alderman this Court held that in camera proceedings were appropriate for the identification of intercepted voices and stated that "[n]othing in Aldermen v. United States [and its companion cases] \* \* \* requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." Taglianetti v. United States, 394 U.S. 316, 317. And amplifying on the per curiam disposition in Giordano v. United States, 394 U.S. 310, Mr. Justice Stewart noted that the Court had not decided that an in camera proceeding was inappropriate for the determination of whether surveillance was legal or not. Id., at 314. Since condisclosure has been found acceptable in other contexts, see, e.g., Alderman, supra, 394 U.S. at 182–183, n. 14; Roviaro v. United States, 353 U.S. 53, there is no absolute constitutional rule of disclosure of every bit of information that might conceivably be of interest to a defendant, and it is proper for the Court to consider now whether automatic disclosure is required for national security interceptions.

Moreover, the opinion in Alderman does not make clear whether the Court imposed the rule of that case as a constitutional requirement or under its supervisory power to regulate admission of evidence in the federal courts. We believe that the case reflects an exercise of the supervisory power. Since Congress. in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518(8)(d) and (10)(a), has taken a more flexible approach to disclosure than Alderman: that decision may well be superseded by legislation with respect to post-1968 surveillance. The legislative history of Title VII of the Organized Crime Control Act of 1970, 84 Stat. 935, 18 U.S.C. 3504, reflects the view of Congress that Alderman imposes a rule that is too inflexible. Even if Alderman is thought to be of constitutional dimension, this considered legislative judgment should be given weight in the decision

whether to require automatic disclosure for national security interceptions.

1. Whether there should be a rule of automatic disclosure of interceptions, rather than a preliminary in camera review for arguable relevance, is not an easy question, even in the context of ordinary criminal cases. Disclosure of overheard conversations has a serious potential for injury to persons who have completely innocent conversations with those who are subsequently prosecuted and receive the disclosure, and even to persons who are not a party to any overheard conversations but may be referred to in those conversations." In some circumstances, the lives and families of government informants may be endangered. Pending investigations and prosecutions can be significantly impaired by the mere disclosure of their existence, which frequently leads to flight by potential defendants and destruction of important evidence. Where the pending matters involve state proceedings

response e.g., Life Magazine, May 30, 1969, pp. 45-47. Excepts from transcripts of conversations overheard through government electronic surveillances published there contained unflattering references to prominent entertainment figures, elected officials, and members of the judiciary, none of whom was a party to any of the published conversations. While a protective order under Rule 16(e) of the Federal Rules of Criminal Procedure might reduce this risk, the fact is that such orders have not been uniformly successful. Here, too, the more people who are shown the material, the greater the danger of exposure, unwitting or purposeful. See Reply Memorandum for the United States, Kolod, et al. v. United States, No. 133, O.T. 1967 (March 1968), at p. 4; Memorandum for the United States, Kolod et al. v. United States, No. 133, O.T. 1967 (April 1968), at pp. 6-7, 16-22.

as well, these undesirable side effects also impinge on state interests and may strain the needed cooperative relationships between federal and state law enforcement agencies.

All these problems are compounded in national security cases, where intelligence gathering is the objective and secrecy is absolutely necessary. Disclosure often will include information pinpointing the location of a particular listening device, information which may be extremely damaging in national security cases. Or the disclosure may reveal the existence of an independent source of information, or the identity of a government secret agent. The very nature of the operations involved in this area frequently militates strongly against the government disclosing its activities, if it is not to compromise the national security. Automatic disclosure here thus operates against the public interest in the government's not revealing generally its intelligence-gathering operations, because such disclosure "might compromise or embarass our government in its public duties." Totten v. United States, supra, 92 U.S. at 106; see also United States v. Reynolds, 345 U.S. 1.

The argument against automatic disclosure is particularly strong in a case like this one, in which a person who is or becomes a defendant in a criminal case is overheard merely by happenstance. The individual overheard is not himself the subject of surveillance, but his conversation is intercepted incidentally and wholly irrelevantly (in respect to his prosecution), in connection with a surveillance to obtain in-

telligence information to protect the national security. In this situation, the contention that an in camera proceeding will inadequately protect the defendant is singularly weak, since the judge can determine without great difficulty that an interception bears no relation to a prosecution.

If disclosure is required in this area, the government must face the dilemma of either dropping the prosecution of an often serious criminal offense or revealing sensitive national security information. When the latter course cannot be followed, the result of the automatic disclosure rule, in practical terms, is to provide the defendant with immunity from prosecution for all crimes, past, present, or future; it may even encourage defendants and potential defendants to telephone persons or locations that they suspect may be the subject of surveillance. This undesirable result can be avoided if disclosure may first be made to the court alone, without further disclosure if the court finds that the material is not arguably relevant to the prosecution.

2. The majority opinion in Alderman does not specifically indicate whether the rule of that case rests on the Court's supervisory power over the admission of evidence in federal courts or on the Constitution, but most reasonably that decision may be viewed as an exercise of the supervisory power. Congress, of

<sup>18</sup> In this case, the defendant, Plamondon, was not the subject of the surveillance authorized by the Attorney General. He was overheard when, fortuitously, he made a call to the telephone installation which was the subject of the surveillance. See pp. 30-31, n. 13, supra.

course, has the power to supersede nonconstitutional decisions. Electronic surveillance in ordinary criminal investigation is now regulated by provisions, 18 U.S.C. 2510-2520, adopted in 1968 as part of the Omnibus Crime Control and Safe Streets Act of 1968. When a person who is prosecuted believes he has been the subject of illegal surveillance, he may move to suppress the contents of intercepted communications and evidence derived therefrom. If such a motion is filed the judge "may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." 18 U.S.C. 2518(10) (a)(iii); see also 18 U.S.C. 2518(8)(d). The statute, thus, does not adopt an automatic disclosure rule, but gives the judge discretion to determine if disclosure is in the interests of justice.19 We contend that this provision supplants the rule of Alderman in the circumstances to which the statute applies.

In 18 U.S.C. 2511(3), discussed supra, Congress excepted national security surveillance from the reach of the 1968 Act because it intended the govern-

<sup>&</sup>lt;sup>19</sup> According to the committee report (S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968)):

This provision explicitly recognizes the propriety of limiting access to intercepted communications or evidence derived therefrom according to the exigencies of the situation. The motion to suppress [evidence] envisioned by this paragraph should not be turned into a bill of discovery by the defendant in order that he may learn everything in the confidential files of the law enforcement agency. Nor should the privacy of other people be unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications.

ment to be able to operate in that area without the stringent limitations that the Act imposed. If, contrary to the congressional view and our submission in Point I above, such surveillance is subjected to preoverhearing judicial scrutiny, then Congress would certainly intend that the requirement to disclose information gathered be no greater than in the ordinary criminal situation. It is clear that Congress would not want a rule of automatic disclosure for national security cases when it has not provided such a rule in ordinary cases. Thus, if Alderman does rest on the supervisory power, as we urge, it should be considered superseded for interceptions occurring, as this one did, after enactment of the 1968 legislation.

3. In Title VII of the Organized Crime Control Act of 1970, 84 Stat. 985, 18 U.S.C. 3504, Congress provided that

2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1967,<sup>20</sup> or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility

This statute is not applicable to the overhearing involved here, which occurred after June 1968. But its passage and legislative history are significant. The leg-

<sup>&</sup>lt;sup>20</sup> As passed, in Pub. Law 91-452, October 15, 1970, this date reads June 19, 1968.

islative history indicates that this subsection rejects the approach of Alderman and is designed to establish a procedure like that argued for by the government in that case. It further indicates the congressional view that Alderman is based on the supervisory power rather than a constitutional mandate and is, thus, subject to legislative change. Interceptions occurring after June 19, 1968, were not covered by this enactment only because it was assumed that these were covered by the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, et seq., rather than Alderman. Finally, the legislative history reflects a determination that protective orders intended to restrict dissemination of matters turned over to the defense pursuant to the defense pursuant to the Alderman requirement are ineffective to preserve the secrecy of interceptions.

The Senate Report, No. 91-617, 91st Cong., 2d Sess. 64 (1970) states that "[b]ecause the price of requiring such admittedly indiscriminate disclosure is so inordinately high, the *Alderman* decision must be set aside by congressional action." As an example of the inefficacy of protective orders, the Report, id. at 69, noted:

National security information dealing with surveillance of a foreign embassay was disclosed in a December 2, 1966; Washington Rost article in spite of a protective order made by the Federal District Court for the District of Columbia. Again, the wiretap transcripts had remained confidential in the Government's hands for over 5 years until they were produced in

court, supposedly in secret, only to appear in the newspaper 3 weeks later.21

During the House debate on the Senate's Title VII proposal, Congressman Poff, a member of the House Committee on the Judiciary who explained the provisions of the 1970 Act on the floor of the House, stated (116 Cong. Rec. H9649 (daily ed. Oct. 6, 1970)):

He later elaborated on the scope of the 1970 provisions (116 Cong. Rec. H9710-9711 (daily ed. Oct. 7, 1970)):

Where there was in fact an unlawful overhearing prior to June 19, 1968, the title provides for

<sup>&</sup>lt;sup>21</sup> Another example involves the so-called Patriarca transcripts in the *Taglianetti* case (see 394 U.S. 316) which, despite a protective order, were made available to a newspaper reporter by court clerks and thereafter widely disseminated. See Richard Connolly, *The Story of the Patriarca Transcripts*, Boston Evening Globe, September 2, 1971, p. 22, cols. 3–6.

<sup>&</sup>lt;sup>22</sup> Numerous other Senators and Congressmen expressed their displeasure with the automatic disclosure rule of Alderman. See, e.g., Senator McClellan, at 115 Cong. Rec. S5810-5816 (daily ed. May 29, 1969); id. at S6092-6096 (daily ed. June 9, 1969); 116 Cong. Rec. S127-130 (daily ed. Jan. 19, 1970); id. at S334-335 (daily ed. Jan. 21, 1970); Senator Hruska, at 116 Cong. Rec. S464-471 (daily ed. Jan. 23, 1970); Congressman McCulloch, at 116 Cong. Rec. H9655 (daily ed. Oct. 6, 1970); Congressman Railsback, at 116 Cong. Rec. H9721 (daily ed. Oct. 7, 1970); and Congressman Minish, at 116 Cong. Rec. H9730 (daily ed. Oct. 7, 1970).

an in camera examination of the Government's transcripts and records to determine whether they may be relevant to the claim of inadmissibility. Where there is no relevancy whatsoever, as determined by the Court, the transcripts need not be disclosed to the claimant or his counsel. To require disclosure under such circumstances can serve no purpose in the interest of justice, and may needlessly jeopardize the lives of Government agents and informants, harm the reputation of innocent third persons, and compromise the national security. To the extent that the court is permitted to determine relevancy in an ex parte proceeding, the title will modify the procedure established by the Supreme Court in Alderman v. United States, 394 U.S. 165 (1968). The Court in Alderman assumed that adequate protection against the dangers inherent in disclosure of the Government's records to the defendant and his counsel could be afforded by the use of protective orders, but the experience of the Department of Justice has indicated time and again that protective orders are inadequate even to prevent the unauthorized publication of its records and transcripts in the news media.

As I have indicated, the title applies only to disclosures where the electronic surveillance occurred prior to June 18, 1968. It is not necessary that it apply to disclosure where an electronic surveillance occurred after that date, because such disclosure will be mandated, not by Alderman, but by section 2518 of title 18, United States Code, added by title III of the Omnibus Crime Control and Safe Streets Act

of 1968. \* \* \* The provisions of this title will, therefore, control the disclosure of transcripts of electronic surveillances conducted prior to June 19, 1968. Thereafter, existing statutory law, not Alderman, will control. \* \*

Senator McClellan, who had issued the report on the original Senate bill for the Committee on the Judiciary, agreed that the 1968 Act covered post-1968 interceptions and indicated that its provisions for disclosure coincided with those of the 1970 Act (116 Cong. Rec. S17775 (daily ed. Oct. 12, 1970)):

The House has modified it [Title VII] by making it applicable only to electronic surveillance. Also, it is limited to surveillance that occurred prior to June 1968, the date on which title III of Public Law 90–351 [Omnibus Crime Control and Safe Streets Act of 1968] was enacted.

Electronic surveillance subsequent to that time is controlled by the 1968 [Omnibus Crime Control and Safe Streets] act, where the disclosure standard is the same as it was set out in title VII. See Senate Report No. 1097, 90th Congress, Second Session at 106 (1968). When the Senate passed title VII, it was not limited to electronic surveillance, so it was necessary to make it apply to acts occurring after 1968. This new language applies, however, only to surveillance prior to 1968.

In light of the provisions and history of the 1968 and 1970 Acts, we submit that the automatic disclosure dictated by Alderman should be considered superseded by congressional enactment even in respect to ordinary criminal cases. A fortieri it was Congress' intent that automatic disclosure not be required in the narrow

class of national security cases which it has exempted from the coverage of the 1968 Act. Even if Alderman be regarded as based in part on the Constitution, the special dangers of automatic disclosure for national security interceptions, the inefficacy of protective orders, and the strongly expressed congressional view that initial in camera determinations are consistent with the Constitution, should lead this Court not to compel automatic disclosure when interceptions without prior judicial anthorization are made to protect the national security.

#### CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded to that court for further proceedings consistent with the opinion of this Court.

Respectfully submitted.

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SEPTEMBER 1971.

### APPENDIX

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

. The Omnibus Crime Control and Safe Streets Act of 1968 provides, in pertinent part (82 Stat. 214, 18

U.S.C. 2511(3)):

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Not shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial mearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

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IN THE

## Supreme Court of the United States

Остовек Текм, 1971.

No. 296 70-153

UNITED STATES,

Petitioners.

vs.

UNITED STATES DISTRICT COURT,

.Respondent.

ON WRIT OF CERTIQRARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETTHON FOR LEAVE TO FILE AN AMICUS
CURIAE DRIEF

AND

BRIEF OF AMERICAN FEDERATION OF TEACHERS
AS AMICUS CURIAE.

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### Supreme Court of the United States

OCTOBER TERM, 1971.

No. 239

### UNITED STATES,

Petitioners.

vs.

### UNITED STATES DISTRICT COURT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## PETITION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF.

Now comes the American Federation of Teachers by its General Counsel, John Lightenberg, and petitions the Court for leave to file a brief as amicus curiae in the above captioned cause and in support thereof states as follows:

- 1. The American Federation of Teachers is a union of teachers affiliated with the AFL-CIO. The overwhelming majority of its members teach in the public schools. The American Federation of Teachers is composed of approximately 1,000 locals throughout the United States and overseas with more than 250,000 members.
- 2. The American Federation of Teachers and its local unions and many of its members have been involved in much litigation throughout the United States concerning

the right of teachers to join organizations, refrain from disclosing their affiliations and the constitutionality of loyalty oaths.

- 3. The American Federation of Teachers is deeply interested in the case at bar, as the decision of this Court in the case at bar will have a substantial effect upon the rights of its members, and may well have a profound effect upon the ability of teachers to take part in the activities of organizations.
- 4. In addition because the use of electronic monitoring equipment is becoming widespread in schools the decision in this case may have an even more profound effect upon the way teachers conduct classes and conduct conferences with parents, students and fellow teachers.
- 5. A request has been made of the attorneys representing the appellant and appellee seeking their consent to the filing of a brief amicus curiae by the American Federation of Teachers.

WHEREFORE, petitioner asks leave that its brief amicus curiae may be filed with this Court.

Respectfully submitted,

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> General Counsel, American Federation of Teachers.

IN THE

### Supreme Court of the United States

OCTOBER TERM, 1971.

No. 239

UNITED STATES,

Petitioners.

vs.

UNITED STATES DISTRICT COURT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

## BRIEF OF AMERICAN FEDERATION OF TEACHERS AS AMICUS CURIAE

#### INTRODUCTION.

The Court of Appeals opinion quotes the Attorney General's statement of the avowed purpose of the instant wiretapping program:

"to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government."

The government seeks to carry on its program without having to obtain search warrants prior to undertaking electronic surveillance.

Basic constitutional principles—the doctrine of separation of powers and the scope of presidential powers of course are of great significance in this case. However, the American Federation of Teachers in this brief wishes to direct the court's attention to the effect of unchecked eavesdropping upon the public service and more particularly on the classrooms.

ARGUMENT.

PUBLIC EMPLOYEES AND PARTICULARLY TEACHERS HAVE BEEN THE OBJECT OF UNNECESSARY AND UNWARRANTED CHARGES AND INVESTIGATIONS REGARDING THEIR LOYALTY AND THE ORTHODOXY OF THEIR IDEAS.

Whether there has been a desire to protect society from teachers who might actually be attempting to overthrow the government or whether there has been a desire to simply maintain orthodoxy in the classroom, it is apparent that teachers have, as a group, often become the subject of unfounded suspicion and unwarranted accusations.

This Court has struck down as unconstitutional a variety of loyalty oaths that have been imposed on teachers. See Weiman v. Updegraff, 344 U. S. 182 (1952); Cramp v. Board of Public Instruction, 368 U. S. 278 (1961); Baggett v. Bullitt, 377 U. S. 360 (1964); Elfbrandt v. Russell, 384 U. S. 11 (1966); Keyishian v. Roard of Regents, 385 U. S. 589 (1967) and Whitehill v. Elkins, 389 U. S. 54 (1967).

Likewise this Court has espoused the principle that teachers must have a wide range of freedom in conducting their classes. In Shelton v. Fucker, 364 U. S. 479, 387 (1960), this Court said the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." In Epperson v. Arkansas, 393 U. S. 97, 104 (1968) the Court said it would not fail to apply "the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." In Tinker v. Des Moines Independent Community School District, 393 U. S. 503, 513 (1969), this Court said: "... we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."

In Pickering v. Board of Education, 391 U. S. 563 (1968) this Court reversed the discharge of a teacher who had been critical of school officials noting that teachers do have full constitutional rights.

That such cases continue to come to this Court for review is ample proof that there remains a continuing disregard for the principle that this Court has so well articulated—Public school teachers have full constitutional rights.

The American Federation of Teachers is keenly aware of the subtle social and political restrictions which are imposed upon teachers.

To add to those restrictions the possibility of being monitored because of some association or unorthodox statement only tends to suppress freedom of expression and association.

The era of stringent loyalty oaths and required support of the status quo hopefully has ended. However, the memory of job denials because of suspected union affiliation or possible disloyalty is still fresh.

#### II.

# THE ALLOWANCE OF UNCHECKED POWER TO EAVES. DROP WILL HAVE A SERIOUS NEGATIVE IMPACT ON SCHOOLS.

We suggest to the Court that its decision in this case will have a profound effect on the practice of electronic surveillance in other areas of government. Currently there is probably more eavesdropping going on in American schools than any other area of government. This is the result of one aspect of the building boom since World War II.

Electronic monitoring systems are regularly installed as part of new schools. These systems allow the main office to communicate with classrooms and vice versa by the simple flip of a switch. The presence of the monitoring devices is obvious. But many teachers have learned that although they have turned the switch in their classrooms to the "off" or "private" position, the equipment still is operative. Thus, conversations whether in the conducting of a class or the course of a conference are subject to being overheard.

As a result, in many classicoms and even whole campuses throughout the United States teachers take special care in what they say and to whom they speak. We need not reach the question of what circumstances might justify school officials in eavesdropping by the use of electronic equipment. What we do comment on is the fact that school officials install such equipment without any consideration for the rights of teachers, students and parents to be free from being monitored.

Indeed, it seems that some college campuses are being "wired" with listening devises and television cameras. This may be a reaction of the campus violence of recent

years. But, if so, we suggest it is a violent over-reaction that needs to be countered at once.

We suggest to the Court that should it prove the Attorney General's program such approval would likely eliminate any inhibitions which school officials presently have about listening in on classroom conversations.

While these considerations may be somewhat removed from the central issue in the case at bar they do underscore the need for a reaffirmation of the right of citizens to privacy not just in possible criminal prosecutions but in everyday life.

Eavesdropping is one aspect of human conduct which is not well adapted to self restraint. Indeed it is of the nature of curiosity that it throws over restraints. In an age in which sophisticated devices allow intrusion into the private matters of other people there is an even greater need for restraint of government through Court supervision. We suggest that the Court resist the effort of the Attorney General to eavesdrop without Judicial supervision.

### CONCLUSION.

The American Federation of Teachers supports the position that if electronic surveillance is justified in any case it nevertheless must be under judicial supervision.

Respectfully submitted,

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> General Counsel, American Federation of Teachers.

Of Counsel:

ANDREW J. LEAHY.

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E. ROBERT SEAVER, CLERK

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1971

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No. 70-153

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTH-ERN DIVISION and HONORABLE DAMON J. KEITH.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR THE DISTRICT COURT AND THE HONORABLE DAMON J. KEITH

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#### IN THE

### Supreme Court of the United States

OCTOBER TERM, 1971 No. 70-153

UNITED STATES OF AMERICA,

Petitioner,

v.

United States District Court for the Eastern District of Michigan, Southern Division and Honorable Damon J. Keith,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS UNITED STATES DIS-TRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION AND HONORABLE DAMON J. KEITH

#### OPINIONS BELOW

The opinions of the court of appeals and of the district court are set forth at pp. 23-85 of the Transcript of Record; the opinion of the court of appeals is reported at 444 F. 2d 651.

#### JURISDICTION

On June 21, 1971, this Court granted the Government's petition for a writ of certiorari, under 28 U. S. C. 1254(1), to review the decision of the United States Court of Ap-

peals for the Sixth Circuit denying the Government's petition for a writ of mandamus to compel the respondent District Judge Damon J. Keith to vacate a pretrial order in a pending criminal case.

#### **Questions Presented**

- I. Whether electronic surveillance that the Attorney General authorized to gather "intelligence information" he deemed necessary to protect the "national security" from domestic organizations is an unreasonable search and seizure when conducted without prior judicial approval.\*
- II. If such national security surveillance is unlawful, whether—notwithstanding Alderman v. United States, 394 U. S. 165—it would be appropriate for the District Court to determine in camera whether the interceptions are arguably relevant to the prosecution before requiring their disclosure to the defendant.

#### Constitutional Provisions and Statutes Involved

The pertinent provisions of the First, Fourth and Fifth Amendments to the Constitution, of the Federal Communications Act of 1934 and of the Omnibus Crime Control and Safe Streets Act of 1968 are set forth in the Appendix, infra.

#### Statement

On October 7, 1969, the defendant Plamondon was indicted by a federal grand jury in the Eastern District of Michigan for conspiring to destroy property of the United

<sup>\*</sup>This statement is a further narrowing of the first question presented in the Government's petition for certiorari, and narrowed in its brief.

States, and for the destruction of such property in violation of Title 18, United States Code, sections 371 and 1361. Plamondon, and his co-defendants, who were charged with participation in the conspiracy, moved on October 5, 1970, for disclosure of certain electronic surveillance information, and for a hearing to be held to determine whether any of the evidence upon which the indictment was based or which the Government intended to introduce at the trial was tainted by such surveillance.

The Government responded on December 18, 1970, admitting that federal agents had in fact overheard conversations in which Plamondon participated, and it filed an affidavit of the Attorney General of the United States, John N. Mitchell, which acknowledged the wiretaps, asserted that they "were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government," and stated that the wiretap installations "had been expressly approved by the Attorney General." The records of the intercepted conversations, along with copies of the memoranda reflecting the Attorney General's express approval of the installations, were submitted to the District Court in a sealed exhibit for in camera inspection.

The Government conceded that no neutral judicial officer was asked to approve the wiretaps either before they were installed or during the extensive period they were employed. And it made no claim that an emergency or other circumstance existed that made it impracticable or even difficult to secure prior judicial approval. Rather, the Government asserted, the legality of such surveillance is an issue "peculiarly within the area of executive rather than judicial competence and, therefore, is the type of decision which should not be subject to judicial review in a warrant proceeding. . . . Since the executive branch alone

possesses both the expertise and the factual background to assess the reasonableness of such a surveillance, the courts should not question the decision of the executive department that such surveillances are reasonable and necessary to protect the national interest." Gov't Memorandu I, filed Dec. 10, 1970, pp. 6-7. The notion of probable cause and judicial participation were claimed to be irrelevant to searches engaged in to gather intelligence information as distinguished from searches to produce evidence for use in proving crime.

Judge Keith rejected these contentions and held the surveillance illegal, pointing out that the Attorney General's affidavit did not even allege that "unlawful means" were being employed. Transcript of Record, p. 31. He granted the defense motion, and ordered the Government to disclose the information sought. The Government was granted a stay of the disclosure order, however, and filed in the Court of Appeals for the Sixth Circuit for a writ of mandamus to compel Judge Keith to vacate the order. The Sixth Circuit held that mandamus was appropriate,\* but denied relief on the merits. The Government's petition for a writ of certiorari to review that judgment was granted on June 21, 1971, 403 U. S. 930.

#### SUMMARY OF ARGUMENT

1

This case is controlled by the rule in Katz v. United States that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." No recognized exception applies, and the Govern-

<sup>\*</sup>Respondents do not contest this conclusion.

ment cannot justify its failure to obtain a warrant in this case by analogy to any recognized exception.

While the Fourth Amendment does not prohibit all warrantless searches, its governing principle is that such searches are unreasonable except in carefully defined classes of cases. This principle is deeply rooted in our history. The Fourth Amendment was adopted to require all searches for which warrants were used to comply with the prerequisites of common-law judicial warrants, including particularity in describing the subjects of a search and their location; probable cause to believe a crime had been, or was being, committed; and review by a neutral magistrate before the search occurred. These prerequisites were designed to protect the innocent, and were placed in the Bill of Rights to prevent their displacement through legislative action.

The Government bears a heavy burden to justify creating a new exception to the warrant requirement. It is a burden not just to show a need to search, but a need to search without warrant. Existing exceptions to the warrant requirement provide no support for the power sought in this case. The executive has broad authority to gather information to protect society, including the power to search in connection with crimes covering every conceivable threat to national security, and to eavesdrop without warrant in emergencies under the Omnibus Crime Control and Safe Streets Act of 1968. The President must exercise his powers through constitutional means. He is sworn, not to protect the government as such, but to "preserve, protect and defend the Constitution of the United States."

"Information gathering" through electronic surveillance

"Information gathering" through electronic surveillance is more, not less, threatening to privacy and protected freedoms than conventional searches undertaken to prove specific crimes. Electronic "information gathering" is ex-

tremely indiscriminate in scope. By its nature, and because of the devices used, "information gathering" is not limited to obtaining any specific evidence of any crime by any person. Such searches are implemented without probable cause, simply on the basis of the Attorney General's judgment. The nation's chief prosecutor cannot provide the neutral review that the Constitution requires. So broad is the standard under which the Government claims to have acted, that searches pursuant to it are likely to chill free expression and other protected activity. More discriminate means for regulation are available. The Government's argument that few persons surveilled will be prosecuted on the basis of information collected misses the point. It is disingenuous to classify as "intelligence gathering" searches that are capable of producing usable evidence. And in any event, the Fourth Amendment was written to protect those of us who are not prosecuted for crime, not just those who are.

After-the-fact review under the most exacting standards would not satisfy Constitutional principles. The real evil aimed at by the Fourth Amendment is the search itself. Not only does the Government suggest after-the-fact review, however; it contends that the review must be extremely limited, on the basis of an "arbitrary and capricious" standard, in which particular searches would not be scrutinized. The proposed scheme is patently deficient, and would leave enormous, unchecked power in political hands.

Requiring warrants for electronic surveillance would not frustrate any legitimate government objective. Disclosure to courts of information necessary to judge the reasonableness of such surveillance poses little danger, and leaks can be prevented through special precautions. Not all information connected with a "national security" search need be disclosed. Warrants may issue on hearsay, and the identity of informers may be withheld. Courts are well

suited to consider complicated fact situations, and to draw inferences. They are obliged to do so where constitutional rights are at stake. And Congress contemplated that they would do so, by providing for judicial supervision of electronic searches in connection with national security crimes. That the Attorney General will personally authorize each surveillance, and that Congress may provide some oversight of his judgments, is desirable, but perfectly consistent with a judicial role.

Prior surveillance practice has varied, and therefore cannot support the present claim. It was based, moreover, on the theory that wiretapping could be conducted, so long as no divulgence occurred. Until this case, the Government has consistently conceded that the fruits of warrantless wiretraps are inadmissible at criminal trials. Congress has taken no action that supports so extreme a departure from this established rule. Section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 is neutral on the issue whether the President does have power to eavesdrop on domestic activities. Assuming, arguendo, that the Act did recognize some such special power, the present search is unlawful because the Attorney General authorized it to gather "intelligence information," where neither force nor unlawful means was claimed to be threatened.

Whatever authority the President may have to utilize warrantless electronic surveillance with respect to foreign powers cannot be invoked to support this domestic search. Special power in foreign affairs is recognized only where domestic rights can remain protected. The distinction between foreign and domestic activities is well established, and is a serviceable guide for all branches of government. Any ambiguity that the distinction may pose in other cases need not be considered here, where the purely domestic character of the surveillance is conceded.

Alderman v. United States requires that the relevance of illegally seized evidence to a prosecution be determined with the full participation of a defendant aggrieved by the search. This is a rule of constitutional dimension, recently established after thorough consideration of all relevant arguments. Federal courts cannot properly determine relevance ex parte. Nor should they do so. Any inconvenience caused the Government through disclosure is of its own making. This is not to say that defendants should be allowed to rummage through Department of Justice files. Alderman requires only that the conversations in which the defendant was overhead be disclosed. The most effective way to protect the innocent from harmful disclosures would be to spare them from illegal intrusions.

This Court has already determined that the Alderman principle applies to "national security" surveillance. Disclosure is especially important in such cases. The exclusionary rule will work effectively to deter unlawful eavesdropping authorized by the Attorney General, and public awareness of how the government exercises its wiretapping powers will be enhanced.

The Omnibus Crime Control and Safe Streets Act of 1968 supports disclosure as ordered in Alderman. Indeed, it allows disclosure in adjudicating the legality of a search, and even before a motion to suppress has been made. Section 2511(3) specifically provides that only reasonably seized material can be used as evidence, and Alderman established the constitutionally required method for determining whether the prosecution's case is tainted by the use of inadmissible material. The Organized Crime Control Act of 1970 is inapplicable to the instant search, and its history is inadequate to change the clear import of the 1968 Act, especially in light of the Congressional policy favoring disclosure of defendants' statements.

#### ARGUMENT .

I.

ELECTRONIC SURVEILLANCE THAT THE ATTORNEY GENERAL AUTHORIZED TO GATHER "INTELLIGENCE INFORMATION" HE DELMED NECESSARY TO PROTECT THE "NATIONAL SECURITY" FROM DOMESTIC ORGANIZATIONS IS AN UNREASONABLE SEARCH AND SEIZURE WHEN CONDUCTED WITHOUT PRIOR JUDICIAL APPROYAL.

#### INTRODUCTION

This case is controlled by the rule in Katz v. United States, 389 U. S. 347, 357 (1967); that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The fruits of unreasonable searches and seizures are inadmissible in evidence in criminal trials. Weeks v. United States, 232 U. S. 383 (1914).

The Government does not claim that the search undertaken in this case was justifiable under any existing exception to the warrant requirement. Nor does it reason by analogy that the rationale behind the existing exceptions would support a proposed "national security" exception. It seeks, instead, a new exception to the warrant requirement; indeed, it seeks for all searches the Attorney General labels "national security" a complete exemption from any meaningful judicial scrutiny either before or after the searches are undertaken.

There are several fundamental distinctions between this case and other conceivable situations in which the legality of warrantless surveillance may be tested. First, the surveillance here was not based upon probable cause to believe that unlawful acts relating to the nation's security had been, or would be, committed; it was ordered because the

Attorney General unilaterally "deemed" it necessary to gather "intelligence information." Second, this case involves a special and extraordinarily vague aspect of "national security." The surveillance was undertaken to secure information about "attempts of domestic organizations to attack and subvert the existing structure of the Government." Gov't Brief, p. 3. (Emphasis added.) This is not therefore a case where our national security was said to be threatened by foreign spies. Third, no reason of substance is advanced to excuse the Government's failure to secure a warrant for this search. And all the reasons advanced for avoiding the courts before surveillance are in fact reasons for precluding any meaningful judicial role even after surveillance. Fourth, it is essential to focus on the remedy granted by the District Court in this case—an order that the fruits of the surveillances must be disclosed to defendant Plamondon. Not presented, for example, is the question whether the federal courts could or should enjoin or otherwise affirmatively prohibit any search that the President or his chief law enforcement officer decides must be carried out. Finally, even assuming that the Government's arguments are all correct, the present search is unlawful because the Attorney General's affidavit failed to allege that the activities surveilled potentially involved the use of force or other unlawful means. See discussion, infra at 64-65.

To justify its position, the Government engages in a line of argument strangely and dishearteningly lacking in recognition of the legal fabric woven by the founding fathers and by this Court to protect our fundamental liberties. One might think, in reading the Government's brief, that we had no pertinent history to help resolve this profound question. One might infer, from the Government's proposed reniedy of limited post-surveillance judicial supervision through motions to supress, that the Fourth Amendment was written solely to protect the privacy of the

criminally accused. And one might assume, from the Government's alleged "balancing" process, that the President would be rendered powerless to protect us if denied the extreme authority sought in this case.

Actually, we have a rich heritage of history and judicial experience that is highly germane to the issue before this Court. The Fourth Amendment was written to protect the privacy of all citizens, not just the criminally accused, and is of special relevance to searches that potentially inhibit free expression and association. And the Government's claim that virtually untrammeled power to search electronically is essential to the national security is an unworthy appeal to fear. The President has a vast arsenal of powers to protect the national security, including recent statutory authority to eavesdrop without a warrant in emergencies.

# A. The Warrant Requirement Plays the Central Role Under the Fourth Amendment in Controlling Executive Power.

The Government's argument is essentially a two-step process. First, it seeks to establish that the test for determining reasonableness under the Fourth Amendment is a "weighing of the competing interests involved." Gov't Brief, p. 11. It contends that "the Fourth Amendment does not prohibit all searches and seizures without a warrant, but only unreasonable ones." Id. at 23. Then it purports to "balance" the interests and finds that "the governmental interest in protecting national security" outweighs the invasion of personal rights resulting from the surveillance. Id. at 15.

The Government's initial premise is faulty. Determining whether as search is "unreasonable" involves more than the weighing of interests. The process must begin with the "one governing principle, justified by history and by current experience, [that] has consistently been fol-

lowed: except in certain carefully defined classes of cases. a search of private property without proper consent is 'unreasonable' unless it has been authorized by a validsearch warrant." Camara v. Municipal Court, 387 U. S. 523, 528-29 (1967). The warrant requirement is not merely one method of assuring that a search under the Fourth Amendment is-reasonable, as the Government suggests; rather, the very words of the Constitution "mandate, ... adherence to judicial processes," United States v. Jeffers, 342 U. S. 48, 51 (1951). Analysis must begin with the premise that "the general requirement that a search warrant be obtained is not lightly to be dispensed with, and 'the burden is on those seeking [an] exemption [from the requirement | to show the need for it. . . . ' United States v. Jeffers, 342 U.S. 48, 51." Chimel v. California, 395 U.S. 752 (1969); Vale v. Louisiana, 399 U. S. 30, 34 (1969).

The warrant requirement is as old as this nation's freedom. It stemmed largely from two experiences, vivid in the minds of the framers and highly instructive on the present issue. First, was the effort in 1763 by the British Secretary of State, the equivalent of our Attorney General, to issue what became known as "general warrants" to search persons and places for evidence of seditious libels which the Secretary had determined were threatening to Britain's national security. The searches authorized at that time led to a series of decisions culminating in Entick v. Carrington, XIX How. St. Tr. 1029 (1763), and Wilkes v. Wood, XIX How. St. Tr. 1154 (1763), in which those executive warrants were held unlawful. Second, was the issuance in this country of so-called writs of assistance in connection with searches for uncustomed goods. These were attacked by leaders of the generation of Americans who drafted our Constitution for many of the same reasons that led Chief Justice Pratt (later Lord Camden Dand Lord Mansfield to declare invalid the general

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warrants issued by the British Secretary of State. See generally, Taylor, Two Studies in Constitutional Interpretation, 29-34 (1969); Lasson, The History and Development of the Fourth Amendment to the United States Constitution, 42-50 (1937). An examination of the opposition to general warrants and writs of assistance shows why the judicial warrant is so fundamental.

First, both the executive warrant issued in England to search for and seize libels, and the writ of assistance issued in colonial America to search for and seize untaxed goods, authorized extremely broad actions by the executing officers. The earlier warrants authorized a search for the printers and publishers of certain pamphlets claimed to be libelous, and directed that such persons be arrested; that their papers be seized; and that they be brought before the Secretary of State to face charges. The persons to be arrested were not identified. The places to be searched were. not described. There was no time limit. And the seizure was to extend to "all" the papers of arrested individuals, libelous or not. Entick v. Carrington, supra at 1065, For the same reasons, writs of assistance were condemned in this country by James Otis and others. They allowed the executing officer "to seize any illegally imported goods or merchandise," and to search anywhere for such goods, at any time during the period from the issuance of the writ until six months after the death of the sovereign during whose reign it issued. And as Otis observed, entry under the writs could be made on "bare suspicion without oath." Wroth & Zobel, eds., LEGAL PAPERS OF JOHN ADAMS, 141-44, (1965).

Second, executive warrants and writs of assistance permitted invasions of homes and private places of subjects without any predetermination that the invasion was supported by evidence. This practice made it far more likely that the *innocent* would be subjected to arbitrary searches and seizures. "[T]he secret cabinets and bureaus of every

subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer or publisher of a seditious 'libel." Entick v. Carrington, supra at 1063. The power claimed could act "against every man, who is so described in the warrant, though he be innocent. It is executed against the party, before he is heard or even summoned; and the information, as well as the informers, is unknown. . . . If this injury falls upon an innocent person, he is as destitute of remedy as the guilty . . " Id. at 1064-65. The same danger existed in connection with writs of assistance. For though they were judicially issued, each was a blanket authorization to search for and seize uncustomed goods. See Lasson, supra at 60.

The legality of general warrants and writs of assistance was challenged by contrasting their characteristics with those of the common-law warrant judicially issued to recover stolen goods. In rendering the court's judgment in Entick, Chief Justice Pratt relied on the striking lack of protection provided by general warrants as compared to stolen-goods warrants. The common law also required that

"It is both striking and enlightening that independently, in London and Boston, the opponents of the warrants based their attack primarily on unfavorable comparisons with the stolen goods warrants." Taylor, supra at 40.

<sup>2"</sup>Observe too the eaution with which the law proceeds in this singular case [of stolen goods]. —There must be a full charge upon oath of a theft committed. —The owner must swear that the goods are lodged in such a place. —He must attend at the execution of the warrant to show them to the officer, who must see that they answer the description. —And lastly, the owner must abide the event at his peril. . . On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select. . ." XIX How. St. Tr. at 1067. See also counsel's argument, id. at 1039. Otis, too, attacked the writ of assistance because of its unfavorable contrast to the common-law warrant for stolen goods, pointing out that the writ allowed searches anywhere, at any time, and required no return. Lasson, supra at 59-60.

the supporting evidence be judicially tested before each search occurred. Common law principles, Lord Mansfield held, prohibited warrants that ordered the arrest of unnamed individuals whom the officer might conclude were guilty of seditious libel. "It is not fire that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." Leach v. Three of the King's Messengers, XIX How. St. Tr. 1001, 1027 (1765). (Emphasis added.)

Yet another lesson of Fourth Amendment history lies, not in what Entick and Wilkes established, but in what they could not establish. The founding fathers were well aware of the inherent weakness of those historic decisions. In England's constitutional system Parliament was, and is, supreme. Lord Camden, Lord Mansfield and others were able to apply common-law principles to the warrants issued by the Secretary of State only because no statute authorized his actions. Had the general warrants been authorized by statute, they would have been upheld.

Americans soon learned on how weak a foundation the English common-law warrant requirement was built. James Otis lost his case. The writ of assistance was upheld on the ground that it had been authorized by act of Parliament. The same doctrine of legislative supremacy that the founding fathers knew had allowed laws regulating speech, reli-

Statutes authorizing general warrants, to be issued by executive officers, were in fact common, especially during the 17th century. Even as the courts were developing principles to limit both the occasion and scope of non-statutory searches and arrests, Parliament was authorizing general warrants in a variety of situations. The Licensing Act provided for virtually the same sort of warrants that were declared invalid in Entick and Wilkes; but the Act had expired in 1695. True it is that some Parliaments restricted the use of general warrants, and that Entick and Wilkes were ultimately hailed and approved by the legislature then in power. But Parliament's position continued to change radically as it had in the past. And even the brilliant and persistent advocacy of William Pitt could not make lasting the victory against general warrants. See generally Lasson, supra at 23-50.

gion, and all else of value also permitted laws that rendered meffective the protections of persons and things hammered out in the courts over centuries of experience.

"This bleak recital of the past was living experience for Madison and his collaborators. They wrote that experience into the Fourth Amendment, not merely its words." Davis v. United States, 328 U. S. 582, 604 (1946) (dissenting opinion of Frankfurter, J.). The dangers associated with general warrants were dealt with by adopting as constitutional principle not subject to legislative or executive whim the protections of the common-law judicial warrant. Overbroad searches, inadequately justified, and authorized by the executive, were prevented by prohibiting warrants "but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amendment IV, U. S. Const.4 Neutral administration was assured through an independent judiciary. And by requiring a detached magistrate's judgment before the search occurs, the innocent would receive protection.

The Government would ignore this history and the rule. of Katz that warrantless surveillance is perese unreasonable, unless some recognized exception is applicable. We are advised, in a mere play on words, that "the Fourth Amendment does not prohibit all searches and seizures without a warrant, but only unreasonable ones." Gov't Brief, p. 5.5 Of.

<sup>5</sup>This argument implies that "reasonable" searches, without a warrant and without more, are perfectly proper and thus that warrants are required only for "unreasonable" searches; which is the same as saying that warrants simply are not required, since "unreasonable" searches are unlawful under the Fourth Amendment, with or with-

out a warrant.

The fight for a Bill of Rights, and for the Fourth Amendment in particular, is instructive. Patrick Henry, among others, pressed the need to protect "personal rights" against Congressional and executive conduct, citing as his example the use of "general warrants, by which an officer may search suspected places, without evidence of his crime . . . "III ELLIOT'S DEBATES 588 (1836). See Lasson, supra at 79-105.

course, the Government's statement is accurate, so far as it goes. But the next step—that warrantless searches are unreasonable unless they fall within a recognized exception—is as much a part of the experience written into the Fourth Amendment as the requirements of "probable cause" and particular description, "The forefathers... were guilty of a serious oversight if they left open another way by which searches legally may be made without a search warrant and with none of the safeguards that would surround the issuance of one." Davis v. United States, supra at 196 (dissenting opinion of Jackson, J.). As Mr. Justice Frankfurter pointedly observed in United States v. Rabinowitz, 339 U. S. 57, 70 (1950) (dissenting opinion):

One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed 'unreasonable.' Words must be read with the gloss of the experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed that it would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary.

The views of Justices Jackson, Frankfurter and others concerning the fundamental importance of the warrant requirement have been adopted in several recent decisions. Vale v. Louisiana, supra at 34; Chimel v. California, supra at 765; Katz v. United States, supra at 357; see Landynski, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 63 (1966); Lasson, supra at 120.

It should be clearly understood and emphasized, however. that the controversy dramatically posed by the decisions in Rabinowitz and Trupiano v. United States, 334 U. S. 699 (1948), has little or nothing to do with the case now before this Court, Rabinowitz, Davis and Chimel, as well as Coolidge v. New Hampshire, 403 U. S. 443 (1971), Harris v. United States, 390 U. S. 234 (1968), and other cases in which the legality of warrantless searches has been adjudicated, involved searches incident to lawful arrests or to some other action that arguably made relevant some recognized exception. The Government's argument here is radically different. The Fourth Amendment was primarily written to protect against general warrants, not searches pursuant to lawful arrests. While the scope of warrantless searches poses important questions, an even more critical issue is posed here.

The Government claims the power to search our homes and other private places, and secretly to intrude upon our speech, even though we may have done or planned nothing to justify an arrest or other lawful detention. There is obviously a vast difference, for example, between claiming the power to search Room A pursuant to a lawful felony arrest in Room B, on the one hand, and claiming the far broader power to search both Rooms A and B—and, indeed, all rooms and all places—even though no lawful arrest has taken place, anywhere. The Government's claim for a new exception is by far the more sweeping. And it is wrong. While there may have been controversy in this Court over the scope of recognized exceptions, no serious challenge has been directed at the "crucial rule," Chimel v. California,

The framers did not . . [prohibit as unreasonable all warrantless searches] because their prime purpose was to prohibit the oppressive use of warrants; and they were not at all concerned about searches without warrants. They took for granted that arrested persons could be searched without a search warrant, and nothing gave them cause for worry about warrantless searches." Taylor, supra at 43.

supra at 761, that searches and seizures must be made pursuant to lawful warrants, or they are unreasonable.

B. No New Exception to the Warrant Requirement Should be Recognized for "Intelligence Gathering" Surveillance of Domestic Activities Deemed Threatening to the "National Security."

The Government attempts to exempt "national security" surveillance from the warrant requirement by weighing "the governmental interest in protecting national security" against the resulting invasion of personal rights. Gov't Brief, p. 15. It argues that the President must gather "intelligence" information to perform his duty to protect the national security; that "intelligence gathering" is a less objectionable form of search than searches primarily intended to secure evidence of crime; and that to require a warrant would frustrate the governmental purpose of such surveillance. The Government contends, moreover, that warrantless electronic "intelligence gathering" is a longestablished practice, authorized by every President since 1940, and that Congress has "recognized" the President's power to engage in such surveillance with respect to domestic activities deemed threatening to the national security. Finally, it asserts that, since it is impossible and pointless to distinguish between foreign and domestic threats, the President should have the same power to eavesdrop in both types of situations.

If balancing should be done, it must be done honestly. The Government's "balancing" assumes that the nation's physical security can be equated with the power to introduce at criminal trials evidence gathered through warrantless electronic intelligence surveillance undertaken without

<sup>7&</sup>quot;Congress has never passed an act purporting to authorize the search of a house without a warrant. . . Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant." Agnello v. United States, 269 U. S. 20, 32-33 (1925).

any demonstration of probable cause. On the other hand, it assumes that the only invasion of personal rights to weigh against the interest in allowing the introduction of the fruits of such surveillance is the invasion of a complainant's personal privacy, made even less significant when his own telephone has not been tapped. See *id.* at 13. Given these unsupported and untenable assumptions, the Government inevitably reaches its ultimate, sweeping assertion that "the possibility of ... abuse ... is not a valid basis for denying the Attorney General the authority." *Id.* at 35.

 There is a heavy burden on the Government to show, not only a need to search, but a need to search without warrant.

Authority "to conduct searches without a warrant in certain situations is well established." Gov't Brief, p. 12. But these warrantless searches are justified, not solely on the need to search, but more specifically on the need to search without warrant. They are exceptions, not alternatives, to the warrant requirement.

'Searches incident to arrests, stop-and-frisks, searches of vehicles, and hot-pursuit situations are exceptions to the warrant requirement because of the practical needs of law enforcement officers to protect their physical well being, Terry v. Ohio, 392 U. S. 1, 23 (1968); Hayden v. United States, 387 U. S. 294, 298-99 (1967); to prevent suspects from using hidden weapons to escape from custody, Chimel v. California, supra at 763; to preserve evidence from destruction or removal beyond the officer's reach, Schmerber v. California, 384 U. S. 757, 770 (1966); Warden v. Hayden, 387 U. S. 294, 299 (1967); Carroll v. United States, 267 U. S. 132, 153 (1925); Brinegar v. United States, 338 U. S. 160, 164 (1949); Cooper v. United States, 386 U. S. 58, 60 (1967); Chambers v. Maroney, 399 U. S. 42, 50-51 (1970), or to respond to an emergency, McDonald

v. United States, 335 U. S. 451, 455 (1948). To be lawful, moreover, even these searches must be based on probable cause.

Customs searches and the seizure of contraband goods under civil process present other exceptions relied on by the Government. But the very cases cited in its brief evidence the special character of such searches. In Boyd v. United States, 116 U. S. 616 (1886), the Government argued that the compulsory process served in that case was justified by analogy to the long-established practice of examining ships and vessels to find and seize untaxed goods. The Court rejected the argument, stating that customs searches "are totally different things from a search for and seizure of a man's private books and papers . . . " Id. at 623. Customs searches and searches for stolen or forfeited goods had long been authorized by the common law; and since the first statute authorizing such searches "was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable' . . . . " Id.

Historical practice, and the governmental need to regulate revenue collection without prior judicial supervision, also justified the civil distress warrant upheld in *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U. S. (18 How.) 272, 285 (1855). "Border searches" are distinguishable on the additional ground that obtaining warrants would be impracticable. Customs laws can only be

<sup>&</sup>lt;sup>8</sup>The Court held that the Fourth Amendment "has no reference to civil proceedings for the recovery of debts . . .," id, and stressed the special character of the debtor—a revenue collector, id. at 278-79.

<sup>&</sup>lt;sup>9</sup>United States v. Johnson, 425 F. 2d 630 (9th Cir. 1970); Walker v. United States, 404 F. 2d 900 (5th Cir. 1968); Alexander v. United States, 362 F. 2d 379 (9th Cir. 1966), cert. denied, 385 U. S. 977 (1966).

effectively enforced through spot-checks, and checks based on suspicion, on some of the literally millions of entries of persons and material that occur annually. This function, long deemed esssential, not only requires searches, but searches without warrants. Furthermore, a nation's borders are in a sense its doors, authority over which may readily be distinguished from authority over the persons and property of those who are lawfully within. The Government has a special interest in screening those who enter, just as it does when persons seek to enter government buildings, Barrett v. Kunzig, Civ. No. 6193, M. D. Tenn., decided Aug. 11, 1971.

Reliance on Abel v. United States, 362 U. S. 217 (1960), and Wyman v. James, 400 U. S. 309 (1971), is also misplaced. Abel involved a search justified as incident to a lawful arrest, pursuant to a warrant authorizing Abel's detention pending deportation hearings that had been issued by the Immigration and Naturalization Service. The Court ruled (by a 5-4 vote) that the search was limited enough to be reasonable under the Fourth Amendment because "government officers who effect a deportation arrest have a right of incidental search analogous to the search permitted criminal law enforcement officers." 362 U. S. at 237. Other items were seized during a search of Abel's luggage after he was in custody. This search, too, was proper under an established rule—that all of a prisoner's belongings in the immediate place of arrest are subject to search.

Wyman v. James involved a case worker's visit to the the home of a welfare recipient, after several days' notice, which was compulsory only in the sense that to refuse to permit the visit would render the recipient ineligible for relief. The Court held that no "search" was involved. Mr. Justice Blackmun also carefully noted for the Court that the issue presented was whether the recipient could be deemed ineligible for refusing to allow such a visit, and not

whether evidence secured from the visit could be used in a criminal trial. 400 U. S. at 324. Alternately, the Court held if the visit was a search, it was a reasonable one because the state had the power to condition bestowing welfare "benefits," to which Mrs. James had no "right," by requiring home visits. Therefore, the only way the Government can rely on Wyman in this case is upon the absurd premise that the Fourth Amendment right is a "benefit" that must be surrendered at the whim of the Attorney General.

The exceptions to the warrant requirement are, therefore, inapposite to support the Government argument that the President needs the power to wiretap without a warrant to gather intelligence information. There is indeed a governmental interest in gathering intelligence information to assure the "protection of the fabric of society itself." Gov't Brief, p. 14. But it is not the interest at stake in this case. The Court in Camara was confronted with an argument identical in principle to that raised here by the Government -"that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures." As the Court noted, "this argument misses the mark. The question is not . . . whether these inspections may be made, but whether they may be made without a warrant," 387 U. S. at 533.

Camara demonstrates how fallacious is the Government's attempt to prove the need for an exception. The question here is not "whether the public interest [in national security] justifies the type of search in question [electronic eavesdropping to gather intelligence], but whether the authority to search should be evidenced by a warrant. . . " Id. The executive branch has broad authority to gather information to protect society, including the power to search in connection with all crimes, covering every conceivable threat

to national security, 10 and to eavesdrop without warrant in emergencies. 11

2. The President's responsibilities must be executed through means consistent with Constitutional principles.

The Government states, and we agree, that "the President is responsible for insuring that our system of government functions as a viable entity." Gov't Brief, p. 15. In fact, his duty is even greater, and more challenging. He is sworn, not to protect the government as such, but to "preserve, protect and defend the Constitution of the United States." U. S. Const. Article II, Section 1. He has great powers, among them the authority to gather information pertinent to his duties. But his powers must be exercised, and the need for information satisfied, through constitutionally proper means.

That the Constitution limits the President even in his most awesome responsibilities is well established. E.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579

<sup>11</sup>In the Omnibus Crime Control and Safe Streets Act of 1968, the Attorney General is empowered to apply to a court for an order to wiretap, or in emergencies unilaterally to authorize wiretaps, subject to subsequent judicial approval, in connection with several crimes, including espinologe, sabotage, treason and riots. 18 U. S. C.

§§ 2516(1)(a) & 2518(7).

firearms or explosives to be used in civil disorders; obstructing firearms or explosives to be used in civil disorders; obstructing firemen or police in performing duties incident to a civil disorder); §§ 792-4 (espionage and related crimes); §§ 1361-4 (malieious mischief against government property, communications, etc.); § 1717 (use of mails to advocate treason, insurrection or forcible resistance to any law of the U. S.); §§ 2381-91 (treason; inciting rebellion; advocating overthrow of government; failure of certain organizations to register); §§ 374-& 372 (conspiracy to violate any law; and to impede or injure any officer of the U. S.); § 2 (aid or abet commission of any offense). There are literally dozens of other, pertinent statutes, executive orders and agency regulations. See generally Government Security and Loyalty: Regulations and Procedure (BNA 1955, Supp. 1970); Internal Security Manual (rev.), Sen. Doc. No. 126, 86th Cong., 2d Sess. (1961).

(1952); Kendall v. United States ex rel. Stokes, 37 U. S. (12 Pet.) 524 (1838). As Mr. Justice Davis stated in Ex Parte Milligan, 71 U. S. (4 Wall.) 2, 120 (1886), in reference to an exercise of the war power:

The Constitution: ... is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by ... man than that any of its provisions can be suspended during any of the great exigencies of government.

The Government stresses that its objective is to safeguard the national security. But the authority it invokes to support its broad claim, *United States* v. *Robel*, 389 U. S. 258, 263-64 (1967), provides eloquent testimony of objectives even more fundamental than national defense:

[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' Home Bldg. & Loan Association v. Blaisdell, 290 U. S. 398, 426... Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution.

It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of these liberties... which makes the defense of the Nation worthwhile.

The Fourth Amendment, related as it is to the First and Fifth Amendments, was designed to protect these fundamental liberties despite emergencies. Mr. Chief Justice Hughes cautioned in Home Bld'g & Loan Ass'n v. Blaisdell, 290 U. S. 398, 442 (1934): "Emergency does not create power. . . . The Constitution was adopted in a period of grave emergency," and "the Constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. . . . " This Court sits to preserve individual rights in the face of arguments based on necessity, in whatever context or by whichever branch of government they are made. 12

Although the Government cites many cases dealing with foreign affairs, <sup>18</sup> it makes no argument that a foreign threat to our security justified the action in this case. The conditions which, according to the Government, require information gathering through warrantless wiretaps, are a recent "alarming" increase in acts of sabotage, and the need to know "the plans of those who have committed themselves, in many instances publicly, to engage in covert, terrorist tactics to destroy and subvert the government." Gov't Brief, pp. 18-19. The latter danger is certainly within the President's power to investigate. When the Government can demonstrate that an individual is preparing to commit terror, it surely will be allowed to act in any reasonable manner, including eavesdropping where appropriate. Terrorist acts are outlawed in this society.

The claim that bombing has increased is factually unfounded and legally irrelevant. Nothing referred to by the

<sup>&</sup>lt;sup>12</sup>E.g., New York Times v. United States, 403 U. S. 713 (1971); Powell v. McCormack, 395 U. S. 486, 549 (1969); and cases cited supra at 24-25.

<sup>18</sup>United States v. Curtiss-Wright Export Co., 299 U. S. 304 (1936); Chicago & So. Air Lines, Inc. v. Waterman Steamship Corp., 333 U. S. 103 (1948); United States v. Belmont, 301 U. S. 324 (1937); United States v. Pink, 315 U. S. 203 (1942).

Government permits its assertion of an increase in bombing "in the last several years." If the statistics alluded to prove anything, they refute the claim that there were "3,285 bombings" from July 1, 1970 to July 1, 1971, "most of which involved government-related facilities." Id. at 18 n.7. The data cited indicate there were far fewer "incidents"

<sup>14</sup>The data referred to by the Government relate to the period beginning Jan. 1, 1969. No comparison may therefore be made of the incidence of bombing "in the last several years." Why, moreover, would an increase in "bombing" over the last several years be significant? These United States have now prospered almost 200 years. If pertinent, would it not be imperative to show that bombing. or other threatening political violence had reached all-time record proportions? Of course, no such showing could be made. After studying the question of violence in America, the National Commission on the Causes and Prevention of Violence concluded that we have "always been a relatively violent nation." To ESTABLISH JUSTICE, To INSURE DOMESTIC TRANQUILLITY 1 (1969). An extensive study prepared for the Commission found that the present period of history is, no more politically violent than many other periods. See Kirkham, Levy & Crotty, Assassination and Political Violence 189-90 (1969). The literature on violence in America confirms this view. See generally Hofstadter & Wallace, eds., AMERICAN VIOLENCE (1970) Graham & Gurr, Violence in America (1969); Aaron, ed., Amer-ICA IN CRISIS (1952).

able studies on bombing (FBI data is unavailable) reveals its methodology in any detail. The National Bomb Data Center (NBDC) informed counsel that its methodology is confidential, beyond the fact that it relies on the media and on "reporting agencies." All that is known of how the Alcohol, Tobacco and Firearms Div. of IRS collected its data is that they were supplied by local and state law enforcement agencies. Hearings on Riots, Civil and Criminal Disorders, before the Perm. Subcomm. on Investigations, Comm. on Gov't Operations, U. S. Sen., 91st Cong., 2d Sess. 5339 (1970). The Staff Study of the Subcommittee on Investigations "was compiled for the most part, from available public source material, news clips, and also limited contact with major law enforcement agencies." Id. at 5757. The figures presented in these studies vary widely, thereby indicating differences in definition, possible bias in collection and reporting, and differing conceptions of what should be reported. The seriousness of these deficiencies is reflected by the literature on crime statistics. See generally Pres. Comm'n on Law Enforcement and Admin. of Justice, The Challenge of Crime in a Free Society 25-31, 38-43 (1967); 1 Radzinowicz & Wolfgang, eds. Crime and Justice 121-29, 130-31, 167-76 (1971); Bell, The End of Ideology 151-74 (1962).

during that period than 3,285<sup>16</sup>; that "incidents" include bombings, attempted bombings, and the use or attempted use of any explosives, including firecrackers<sup>1</sup>; and that only a small proportion of the incidents reported could conceivably be said to involve "government-related facilities" in the sense used in section 2511(3) of the 1968 Act. <sup>18</sup> In fact, the data reveal very few incidents arguably involving activities, seriously threatening to internal security, that eavesdropping could have detected in advance. We stress these facts, not because they are pertinent to the question presented, but because this Government effort to create false fear reflects how baseless are both the claimed need

at its figure of 3,285 "bombings" between July 1, 1970 and July 1, 1971. NBDC figures supplied to counsel in Summary Report 6-71, indicate during that period 1,562 "incidents", involving 2,022 bombs, causing 171 injuries and 15 deaths (as compared, for example, to 55,000 deaths per year in automobile accidents). Moreover, these figures include 270 incidents in which no detonation occurred, involving 420 bombs. We are filing with the Court copies of the relevant NBDC report.

rendered meaningless for present purposes by their indiscriminate inclusiveness. For example, one of the "bombings" which occurred on June 13, 1971 is reported as follows: "St. Paul A small cherry bomb device, which was placed inside a galvanized trash can, detonated behind a private residence. Damage was said to be negligible. 1A-1J-1A-2-1-50-0Y-0Y." Id. at 23. On February 5, 1971, in Anaheim, California, "in what was thought to be a prank, a military flare device was thrown from a car onto an unused section of a shopping center parking lot. No damage resulted in the incident." Id. 2-71, p. 15,

<sup>18</sup> Table D of the NBDC Summary Report 6-71 classifies incidents by "known or suspected" motive. Of 1,562 incidents, no more than 500 could conceivably be said to have involved any level of government. Table F summarizes target locations for June 1971; only 3 of 180 devices were found at military facilities. Even the fact that a device was found at a military facility cannot be taken too seriously. For example, one incident that apparently was counted as such an attack involved recovery of "an incendiary device" at Fort Jackson, So. Carolina, "a short distance from a pond at the military facility." Id. at 15. Apparently counted as acts of "protest" were three bombings "protesting the exhibition of nude art at the Memphis Academy of Arts." Id.

for warrantless eavesdropping and the repeated assurances that our rights can safely be placed in the unchecked discretion of the nation's chief executive or prosecutor.

3. "Information gathering" through electronic surveillance is far more, not less, directening to privacy and protected freedoms than conventional searches undertaken to prove specific crimes.

The Government's claim that a new exception be made to the warrant requirement is based in large part on an asserted distinction between "the collection of intelligence information to protect the national security and a search made in connection with a criminal investigation. ..." Gov't Brief, p. 16. "[T]here may be less need for a warrant," the Government here contends, "where the purpose of the search is not criminal investigation." Id. at 19.10 One cannot distinguish meaningfully between "intelligence" gathering and criminal investigation, and claim at the same time authority to use the fruits of both types of searches in criminal trials. A decision to authorize the use of "intelligence" as evidence is, in any meaningful sense, a decision to allow warrantless electronic searches to gather usable evidence.

Assuming, however, that such a distinction could be made, it does not follow that there is less need for a warrant when "intelligence" is gathered than when evidence is collected. It may be that some forms of warrantless information gathering are less offensive than warrantless criminal investigation. See, e.g., Wyman v. James, supra. But other forms of warrantless information gathering may be far more offensive, even where the information gathered is

<sup>&</sup>lt;sup>19</sup>In the Circuit Court the Government's claim was that warrantless eavesdropping would be used "primarily" to gather "intelligence," and "will rarely if ever, be authorized for the sole purpose of gathering evidence for subsequent criminal prosecutions." Gov't Memorandum, filed Feb. 8, 1971, p. 33.

never used to prove a crime. The offensiveness of a search under the Fourth Amendment cannot safely depend on whether the Government claims its purpose (or "primary" purpose) was informational or evidentiary. It depends, rather, on the nature of the search as judged by the historic purposes of the warrant requirement: to limit the scope of searches; to assure that searches are adequately justified by some evidence before being implemented; to obtain a neutral and detached review of the propriety of a proposed search; and to protect fundamental interests expressed in the First and Fifth Amendments. See Ker v. California, 374 U. S. 23, 33 (1963). By these standards, the warrant procedure is if anything more essential in connection with electronic "intelligence" gathering than in traditional criminal investigation.

a. Electronic "information gathering" is more indiscriminate in scope than searches to prove specific crimes.

The Attorney General's order to search in this case is in every sense a general warrant. It almost totally lacks particularity. It authorizes essentially unlimited eavesdropping of the subjects chosen. We do not know against whom the search was directed. But the authority claimed would certainly allow orders to wiretap groups of unidentified persons. Because of the nature of eavesdropping, moreover, any and all persons having contact with the tapped telephones were also heard. Furthermore, all conversations were intruded upon and, in effect, seized, including those having nothing even remotely to do with national security. And no limit was set on either the times during which eavesdropping could be undertaken, or the duration of any

<sup>&</sup>lt;sup>20</sup>In terms of the interest in particularity it is more, not less, offensive that a complainant's phone was not tapped. That conversations of persons calling a tapped phone are monitored reflects how indiscriminate is the search involved.

wiretaps. The latter point is strikingly illustrated by the fact, revealed in the Government's brief, p. 30 n.13, that the tap involved in this case lasted at least fourteen continuous months, presumably day and night, and indiscriminately intruded upon 952 outgoing calls that were either placed to overseas installations or which dealt with "foreign subject matter," and possibly many more incoming calls and calls that dealt with domestic matters. The general warrants of the 1760's pale into insignificance before the indiscriminate scope of such an electronic search. See Olinstead v. United States, 277°U. S. 438, 473 (1928) (dissenting opinion of Brandeis, J.).

In Berger v. New York, 388 U. S. 41, 45-47 (1967), this Court described extensively the dangers of electronic surveillance, including the breadth of scope made possible by modern technology. "The need for particularity and evidence of reliability... is especially great in the case of eavesdropping," the Court stated, because "[b]y its very nature eavesdropping involves an intrusion on privacy that is broad in scope." Id. at 56.21 The search invalidated there was far less offensive by the criteria of particularity than the present search, since the statute involved in Berger at least required that the persons to be surveilled be named, and that application for authority be renewed after a maximum of two months. Here, no limits existed.

## b. Electronic "information gathering" is implemented without adequate justification.

The electronic search ordered in this case, in common with the general warrants outlawed by the Fourth Amendment, permits invasions of homes and any other places

<sup>&</sup>lt;sup>21</sup>"Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society." *Lopez v. United States*, 373 U. S. 427, 466 (1963) (dissenting opinion of Brennan, J.).

containing telephones, without any predetermination that the intrusion is supported by probable cause. The standard under which the Attorney General claims to have acted gives him the power to order surveillance whenever he "deems" it necessary for national security, a power precisely analogous to that of the British Secretary of State in 1763. We do not know how much proof, of what acts or plans, the Attorney General possessed before ordering the tap in this case. Nor is it relevant in resolving the question before us, since the authority he seeks would permit him to proceed without any predetermination of probable cause. But it is extremely significant that the Government claims to have proceeded here to gather "intelligence information," rather than to prove any crime; that the Government specifically contends that its search should be judged under an "arbitrary and capricious" standard, applied after the fact, rather than "probable cause"; and that the standard must be applied in an inquiry that focuses on the reasonableness of the search's subject matter, rather than on the evidence supporting a particular search (which must often be kept secret).

That a search has no specific crime as its object makes it even more offensive than searches pursuant to general warrants and writs of assistance, which were at least aimed at specific crimes (seditious libel and illegal importation of merchandise). It means that the Attorney General may order a search on the basis of evidence of non-criminal conduct that he labels "threatening to the national security." That the "probable cause" standard, judicially honored for more than 200 years, should be dispensed with in favor of a vague "arbitrary and capricious" standard means that the evidence, if any, of the threatening non-criminal conduct involved need not be as strong as the evidence of criminal conduct normally required for a valid search. And the claim that judicial inquiry must not come to grips with

the evidence in support of particular searches means that the lesser quantum of evidence of threatening non-criminal conduct supporting the search need not even relate to the particular individuals whose privacy is breached. It is enough, says the Attorney General, if the evidence shows that "the subject of surveillance bore" a "reasonable relation to national security...." Gov't Brief, p. 35. This sort of predetermination cannot protect the innocent from general warrants.

The Government argues that the protection derived from the showing of proof normally required before searches are allowed is dispensable, since it is collecting "information" which "normally" will not result in prosecutions. See Gov't Brief, p. 21. Under this view, the Fourth Amendment would protect only those prosecuted. The framers intended no such result. The warrant requirement was adopted "to protect the innocent," United States v. Rabinowitz, supra at 82 (dissenting opinion of Frankfurter, J.), by subjecting whatever proof the Government may have of a crime to the test of "probable cause" before an entry occurs.22 To dispense with the requirement that evidence of a crime be demonstrated before eavesdropping occurs is to invite searches more, not less, offensive. "The purpose of the probable-cause requirement of the Fourth Amendment, to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed, is thereby wholly aborted." Berger v. New York, supra at 59. See also Id. at 54-55.

<sup>&</sup>lt;sup>22</sup>The Court rejected a similar contention in Camara, supra at 530-31:

It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, while the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.

## c. Electronic "information gathering" is implemented on executive order, without judicial supervision

The present search is also deficient because it was implemented without neutral and detached judicial review of its scope or justification. The Government's claim that the judiciary is unsuited to decide matters pertaining to "national security," is an impossible position to maintain. Federal courts frequently rule on such matters, see, e.g., Cole v. Young, 351 U. S. 536 (1956); New York Times v. United States, supra; United States v. Robel, supra, and the Government concedes a judicial role in reviewing the legality of such searches after the fact. The very cases for which the framers set up an independent judiciary to protect our personal liberties were those in which the executive or Congress might claim, as counsel for the government messengers did in Entick v. Carrington, supra, 23 that the national security required us to forego our rights.

The need for judicial intervention before the fact is a protection distinct from the substantive rules that determine reasonableness. Even assuming, for example, that national security requirements justify searches of broader scope than usual, and on the basis of evidence sufficient only to prove that the Attorney General's judgment was not arbitrary and capricious, the warrant requirement would insist that the applicable standards be applied by a neutral magistrate before the fact. This requirement reflects the Constitution's commitment to a government in which no branch is supreme, especially when provisions of the Bill of Rights are at stake. "Under the separation of powers created by

<sup>&</sup>lt;sup>23</sup> "Supposing the practice of granting warrants to search for libels against the state be admitted to be an evil in particular eases, yet to let such libellers escape, who endeavor to raise rebellion, is a greater evil..." XIX How. St. Tr. at 1040. The court responded: "With respect to the argument of state necessity, or distinction that has been aimed at between state offenses and other, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions." *Id.* at 1073.

the Constitution, the Executive Branch is not supposed to be neutral and disinterested." Katz v. United States, supra at 359 (concurring opinion of Douglas, J.). See Coolidge v. New Hampshire, supra at 474.24 Indeed, if the rules relating to the scope of, and basis for, electronic searches are to be varied in national security cases, as the Government argues they should, judicial intervention before the fact becomes even more crucial to prevent abuse of power.

d. Electronic "information gathering" raises substantial questions under the First and Fifth Amendments.

The power claimed in this case raises substantial constitutional questions under provisions other than the Fourth Amendment. "Few could gainsay the vital role of the protections of the Fourth Amendment in a free society, especially as they may guard against invasions of privacy of those suspected of unorthodoxy in matters of political belief and conscience." Landynski, supra at 264-65. "Historically, the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power," Marcus v. Search Warrant, 367 U. S. 717, 724 (1961), a history that was "fresh in the memories of those who achieved our independence and established our form of government," Boyd v. United States, supra at 625-26.25 And this Court has held that the

<sup>&</sup>lt;sup>24</sup>The court held in Entick that the Secretary of State—"the great executive hand of criminal justice," XIX How. St. Tr. at 1064—was not a magistrate authorized to issue common law warrants. id. at 1045-59.

<sup>&</sup>lt;sup>25</sup>General warrants had been widely used to enforce "oppressive laws concerning printing, religion, and seditious libel and treason...," to detect and punish "non-conformism," to censor, to suppress Puritan dissent, and to search and regulate the press. Lasson, *supra* at 24-33. In *Entick*, counsel called upon the court to "demolish this monster of oppression, and to tear into rags this remnant of Star-chamber tyranny," XIX How. St. Tr. at 1039, and Lord Camden described and refused to follow the Star-chamber practice, *id.* at 1069-70.

warrant requirement must be applied with particular care, to require discriminate, well-supported searches, when First Amendment interests are at stake. Stanford v. Texas, 379 U. S. 476, 485 (1965).

The First Amendment prohibits not only prior restraints, "but any action of the government by means of which it might prevent... free and general discussion of public matters...," Grosjean v. American Press Co., 297 U. S. 233, 249-50 (1936) (see Near v. Minnesota, 283 U. S. 697, 715 (1931)), including inhibition as well as prohibition, Lamont v. Postmaster General, 381 U.S. 301, 307 (1965). It protects free expression not only "against heavy handed frontal attacks, but also from being stifled by more subtle governmental interference." Bates v. City of Little Rock, 361 U. S. 516, 524 (1960). Futhermore, it protects against all lawmaking activities, including investigation, DeGregory v. Attorney General, 383 U. S. 825, 829 (1966), even when the investigation is for law enforcement as opposed to statute-writing purposes, Gibson v. Florida Legislative Investigation Comm'n, 372 U. S. 539. 561-62 (1963) (concurring opinion of Douglas, J.).

Investigation in the form of electronic "intelligence gathering" can undoubtedly have a "chilling effect" on groups and individuals engaged in or contemplating protected political activity. See NAACP v. Button, 371 U. S. 415 (1963); Dombrowski v. Pfister, 380 U. S. 479 (1965). The only remedy against overbroad use of electronic surveillance "is to keep one's mouth shut on all occasions." Lopez v. United States, supra at 450 (disserting opinion of Brennan, J.).

The standard under which the Government claims to have acted in this case is found in section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968, which provides that nothing in the Act was intended to limit the "constitutional power of the President to take

such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government." 18 U. S. C. § 2511 (3). We reject the contention. that section 2511 (3) provides authority for eavesdropping. See infra at 59-61. If the section does provide a standard, however, it it an extraordinaril broad one. By appearing to authorize the President to take all measures "he deems necessary," without judicial supervision, it makes valueless any limits arguably imposed by the subsequent language. Even assuming that the measures he invokes must be reasonable in light of the purposes outlined in the statute, those purposes are themselves overbroad. Overthrow of the Government "by force" is familiar, but the phrase "or other unlawful means" is unclear, and could be construed to include forms of peaceful protests, deemed illegal by the Attorney General under standards that might not pass judicial muster, 26 Similarly, while the phrase "clear and present danger" has frequently been used, e.g., Dennis v. United States, 341 U.S. 494 (1951), protecting the "structure or existence of the Government" could allow eavesdropping, not only for dangers to the entire government but to its parts or even to its present form.

The potential breadth of the provision is reflected, for example, by the Memorandum filed by the Government in opposition to defendants' motion to suppress in this case. The Government claimed that warrantless surveillance is necessary to obtain intelligence information about groups "which are committed to the use of illegal methods to bring about changes in our form of Government and which may

<sup>&</sup>lt;sup>26</sup>A peaceful demonstration is protected, regardless of the purposes of its organizers, if it conforms to reasonable government regulation. *Edward v. South Carolina*, 372 U. S. 229 (1963); *Hague v. CIO*, 307 U. S. 496, 515-16 (1939).

be seeking to foment violent disorders." Gov't Memorandum, filed Dec. 10, 1970, p. 8. Apparently, the "illegal methods" need not be violent, and the efforts involved need not be aimed at the "overthrow" of the government, but only at a "change" in its "form," conceivably to one more, not less, democratic or republican. And the change in form may itself be constitutionally permissible, as are changes brought about through legislation or amendment; it is enough that, in the Attorney General's judgment, illegal methods of some sort may be employed toward that end.

The phrase "may be seeking to foment violent disorders" raises at least two serious objections. A person or group may constitutionally argue, for example, through speech alone, that violence may be necessary to change the Government's policies. Such advocacy may be prohibited only where it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U. S. 444, 447 (1969). But the Government's standard would allow eavesdropping even though action was neither likely nor imminent. Second, and more important, is the danger implicit in the Governments use of the word "may." It emphasizes the fact that the alleged delegation of power to eavesdrop contains no requirement that any proof exist that the persons or groups involved are actually seeking to overthrow the Government by force, or are actually engaged in "fomenting" violent disorders. The Government is free to proceed under the formula when it concludes that it is possible that groups or individuals may be engaged in activities covered by the delegation. Not even "probable cause" to believe that the suspects were engaged in the activities covered would be required under the Government's proposed "arbitrary and capricious" test.

The standard said to govern electronic "intelligence gathering" also violates the First Amendment principle

that requires the Government to regulate in areas of protected activity through the most discriminating means available for the task. The Government may not pursue even a "legitimate and substantial end" by means "that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U. S. 479, 488 (1960). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, supra at 438. The standard in section 2511(3) could be construed to allow surveillance of persons and groups concerning whom the Government has no evidence of illegal advocacy or action. For example, because a group may advocate matters which, in the Attorney General's judgment, bring it within the scope of the statute's language, he is arguably free under the Act to authorize eavesdropping on all the group's members.

Indeed, the statute would allow the Attorney General to eavesdrop on a group's entire membership, when only one of its members advocates improper action, where the Attorney General concludes that the individual may be stating a group policy. The so-called standard would allow the Government to use any means for its investigations, and in practice this has meant electronic surveillance, an extraordinarily indiscriminate means for obtaining information. Analogous First Amendment cases have prohibited such indiscriminate government regulation, even where the governmental purpose was to protect the national security. E.g., United States v. Robel, supra at 264-66; Elfbrandt v. Russell, 384 U. S. 11 (1966); Aptheker v. Secretary of State, 378 U. S. 500, 512-13 (1964); Shelton v. Tucker, supra; Scales v. United States, 367 U. S. 203 (1961).

The power to gather statements of persons without their consent, through an indiscriminate means, and without probable cause, also raises substantial questions under the Fifth Amendment where the Government later seeks to

use the statements gathered as evidence. The relationship of the Fourth and Fifth Amendments stems from Entick v. Carrington itself. See Lopez v. United States, supra at 454-57 (dissenting opinion). Statements obtained from a suspect against his will, through a lawful warrant for eavesdropping, may be used as evidence against him. The Fourth and Fifth Amendments, read together, authorize as reasonable a search and seizure even for oral evidence when made pursuant to a proper warrant. Therefore, nothing would be left of the privilege against self incrimination if, in any situation deemed to involve "national security" as broadly encompassed in section 2511(3), oral evidence could be seized without required warnings, through a warrantless electronic search, indiscriminate in scope, and implemented without probable cause. To say that the search in this case is valid is to allow the seizure of a suspect's words in circumstances that obviate the requirement that he consent before being a witness against himself. It is to substitute electronic devices for the rack of the Star-chamber as a way of compelling testimony on mere suspicion—less physically painful, but no less destructive of the values the Bill of Rights sought to preserve.

e. After-the-fact judicial review under an "arbitrary and capricious" standard is constitutionally inadequate.

The Government contends that the Attorney General's decisions to eavesdrop will be adequately checked by judicial supervision after, rather than before, surveillance is completed. It concedes, however, that the judicial supervision it contemplates must be "extremely limited" in scope. In the Government's view, an electronic search for intelligence information must not be judged, even after the fact, by whether "probable cause" existed for the Attorney General's belief that his authority under the "standard" of the

Omnibus Crime Control and Safe Streets Act should have been exercised. Rather, the appropriate test is claimed to be the "arbitrary and capricious" standard, previously reserved for commonplace discretionary actions of government agencies. And, since most of the information necessary to apply even this watered-down test would not be made available to the court because it is "confidential," a court would rarely, if ever, be able to make an informed judgment on the need for a "particular" search. "The court should not substitute its judgment for that of the Attorney General." Gov't Brief, p. 22. Indeed, the Government contends that it would be inappropriate to review the need for a particular surveillance, id. at 23; the sole test should be whether "the subject of surveillance bore no reasonable relation to national security." Id. at 35.

This proposed scheme for judicial participation is patently deficient. Even if a convincing case could be made for making an exception to the warrant requirement for "national security" investigations, the proper standards for review after the fact must be substantially the same as those applied before the fact. A warrantless search allegedly falling within an exception must be reviewed, first, to determine whether the exception properly applies. For example, a search incident to an arrest is lawful only if the arrest itself was valid; probable cause must be demonstrated in each case to justify the initial intrusion on the suspect's privacy. Further, the scope of a warrantless search is limited in accordance with the purpose for which it was allowed. In Chimel v. California, supra at 763, this Court held that a search incident to an arrest can extend only to the "arrestee's person and the area 'within his immediate control'construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence." See also Coolidge v. New Hampshire, supra at 455-73, and authorities cited therein.

The Government would dispense with the probable cause test—thereby raising serious constitutional questions, see, e.g., Berger v. New York, supra at 59; Camara v. Municipal Court, supra at 535— and would legalize intrusions wherever the subject bears a "reasonable relation to national security." And the Government position apparently would allow no supervision of the scope of national security searches. Only reviewing the particulars of a search will reveal whether the Government went too far; but under the Government's "standard," the courts would be denied access to the particulars.

Even an after-the-fact review that met all the traditional Fourth Amendment requirements could not substitute for review in a warrant proceeding. "[A]fter-the-fact justification for the . . . search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U. S. 89, 96 (1964). Second, after-the-fact review can only seek to deter future unreasonable searches by excluding evidence or awarding other relief to the aggrieved party. But "[t]he real evil aimed at by the Fourth Amendment is the search itself . ." United States v. Potter, 43 F. 2d 911, 914 (2d Cir. 1930) (L. Hand, J.). Only before-the-fact review can prevent unreasonable searches from occurring.

Moreover, after-the-fact review of national security electronic surveillance would generally be available only to individuals who are being prosecuted, when they move to suppress. As the Government states, however, "most national security electronic surveillances do not result in prosecutions." Gov't Brief, p. 21. Most persons surveilled would therefore be denied any remedy for illegal intrusions, since the fact that such a search has occurred will be kept secret. The subjects of warrantless conventional searches, or of electronic searches conducted under the Omnibus Crime Control and Safe Streets Act of 1968, would generally receive notice of such searches, thereby enabling them to

seek judicial relief even when they are not prosecuted. See Fed. R. Crim. Proc. 32; 18 U. S. C. § 2518(8)(d). But the subjects of warrantless "national security" surveillance who are never prosecuted would never know their privacy had been illegally invaded. They can be protected from illegal intrusions only through a warrant proceeding.

Ultimately the Government's position rests on its cavalier observation that "any power a government official possesses is subject to abuse, and that possibility is not a valid reason to deny him the power." Gov't Brief, p. 35. It is disturbing that the Attorney General's "power" here referred to is discussed in the Government's brief as if it were a common place administrative discretion rather than the awesome power to intrude in to the lives of individual citizens without any meaningful judicial supervision. "[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used." Bivens v. Six Unknown Named Agents, 403 U. S. 388, 392 (1971). It persists. And it becomes available, for misuse and further exploitation, to each new administration, in each new national crisis. The possibility of abuse of the privacy of homes and communications is precisely why the warrant requirement was established. The Bill of Rights is a national commitment to avoid such possibilities.

 Resort to the warrant procedure would not frustrate the legitimate purposes of domestic "national security" searches.

At the heart of the Government's effort to prove its need for warrantless "national security" eavesdropping is its attempt to invoke the rule enunciated in *Camara*, *supra*, at 533. Gov't Brief, pp. 23-24. Not only does the Govern-

ment distort the language of Camara<sup>27</sup>; it misinterprets the rule. The frustration in purpose that Mr. Justice White, writing for the Court, had in mind appears in the sentence immediately following the language quoted in the Government's brief: "It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement. Thus, we do not find the public need argument dispositive." (Emphasis added.)

But the "frustration" to which the Government refers in its brief is of an entirely different character; it relates to no more than the burden or risks that it conceives to be involved in disclosing to "a magistrate of all or even a significant portion of the information and policy, considerations the Attorney General weighed in reaching his decision" to engage in electronic surveillance which would "create serious potential dangers to the national security . and to the lives of informants and agents," Gov't Brief, p. 24. That might make effective surveillance impossible, the Government argues, and "frequently" would compel the Attorney General to choose between disclosure and "foregoing the use of a proven effective method of gathering intelligence information . . ., id. at 26. It asserts, moreover, that requiring a warrant "would compel the judiciary to embak upon a far different kind of inquiry than courts now make in considering an application for a warrant," one which is beyond their "experience or facilities." Id. at 25-26.

<sup>&</sup>lt;sup>27</sup>In quoting from Camara, the Government omitted the italicized language in the following: "In assessing whether the public interest demands' creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." The omission obscures the fact that the Government must make a case for an exception to an important Constitutional principle.

The claim that disclosure of "highly confidential" information to the federal courts in warrant proceedings would endanger the national security and the lives of informants is totally unsupported. We are not told of a single instance in which any federal judge or magistrate abused his authority by revealing to unauthorized persons information communicated ex parte for the purpose of passing upon the legality of a contemplated search. The danger of leaks by clerks, stenographers and other assistants can readily be avoided. As the Court of Appeals noted, "If there be a need for increased security in the presentation of certain applications for search warrant in the federal court, these are administrative problems amenable to solution." 444 F. 2d at 666. In particularly delicate situations the Attorney General might seek his warrant from the Chief Judge of the appropriate United States Court of Appeals or from his designee. See 18 U. S. C. § 2510 (Supp. V., 1965-69).

The Government's argument suggests that all information relevant to probable cause must be disclosed in a warrant proceeding. This is incorrect. A warrant proceeding allows wide flexibility in the type of information that may be presented or withheld. Strict evidentiary rules are inapplicable. Brinegar v. United States, supra at 176. The Government may rely on information received through an informant, see Draper v. United States, 358 U. S. 307 (1959), even to the point that a warrant may issue solely upon hearsay, Jones v. United States, 362 U. S. 257, 271 (1960). And, significantly for present purposes, the informer's identity need not be revealed, either before the search or subsequently on a motion to suppress. McCray v. Illinois, 386 U. S. 300 (1967). Courts would, if anything, be even more sensitive to the need for secrecy of sources in "national security" cases than in ordinary criminal prosecutions. Therefore, whatever may be the merits of the Government's claim that eavesdropping is a "proven effective method of gathering intelligence information,"<sup>27</sup> the dangers posed by requiring a warrant before evidentiary use is permitted are modest at most, and may readily be obviated. And when a warrant is obtained the government may invoke the rule of *United States* v. *Ventresca*, 380 U. S. 102 (1965), giving it the benefit of any doubt concerning the search's legality.

The courts have traditionally issued warrants in cases involving the "national security" and, despite the Government's doubts, the task is "within the reach of experienced trial judges." Nardone v. United States, 308 U. S. 338, 341 (1939). As we have seen, in implementing the warrant requirement the judiciary seeks to limit the scope of the intrusion contemplated, to assure that an intrusion is sufficiently justified, and to perform its constitutionally mandated role of protecting the exercise of fundamental freedoms from arbitrary executive power. Whether a proposed eavesdrop is too broad in scope, or lacks adequate justification, or threatens fundamental freedoms are similar inquiries irrespective of whether the subject matter involves an ordinary crime or conduct deemed highly threatening to the nation's safety.

We are not told the basis for the Government's obscure assertion that "in the usual law enforcement situation" an officer seeking a warrant is able to rely upon "a small number of simple facts" to prove probable cause, whereas in "national security surveillance cases" the justification generally "involves a large number of detailed and compli-

<sup>37</sup>That eavesdropping may be an effective means of gathering intelligence is not at issue. Neither, for the matter, is it pertinent whether eavesdropping may be an effective means of proving crimes, though there is substantial evidence to indicate its ineffectiveness in this regard, see Berger v. New York, supra at 60-62, as well as its high cost, see Admin. Office U. S. Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications 17 (April 1971) (average cost of each federal court-approved wiretap during 1970 was \$12,106).

cated facts whose interrelation may not be obvious to one who does not have extensive background information, and the drawing of subtle inferences." Gov't Brief, p. 25. The gravest threats to national security may be simple situations. On the other hand, conventional criminal cases (organized crime, bankruptcy and security fraud, etc.) frequently require the courts to consider a "large number" of "detailed and complicated facts," which are subtly interrelated. Counsel's job, in such cases, is to explain why the facts establish a sufficient basis for an intrusion, and how broad an intrusion is required. A federal court's constitutional duty is to pass on such arguments and thereby to protect the innocent from improper intrusions. The judiciary's experience and facilities are peculiarly suited to understanding complex factual issues, and to drawing subtle inferences. And common sense suggests that a neutral review is particularly necessary when the Attorney General seeks to eavesdrop on facts and inferences so subtle and complicated that even our most able law enforcement officers would find difficulty in explaining how they justify the search.

The Government's views concerning both the danger and inappropriateness of before-the-fact judicial supervision vary markedly from Congress' assumptions, as reflected in the Omnibus Crime Control and Safe Streets Act of 1968. The Act unambiguously reflects Congressional confidence in the appropriateness of judicial review of electronic surveillance. It contains detailed procedures for pre-surveillance judicial supervision of all interceptions, conferring upon courts even more responsibility in some respects than the Constitution requires in connection with searches by conventional means. See *infra* at 58-59. It specifically requires such review in connection with crimes such as espionage, sabotage, treason and Presidential assassination, 18 U. S. C. § 2516(1)(a)(c), just the sort of cases in which the Government claims disclosure would

gravely threaten national security. It calls for allegations of facts upon which the intrusion is claimed to be justified, 18 U. S. C. § 2518(1), and leaves to the court's discretion whether the information seized should be made available to an aggrieved person upon his filing a motion to appress, 18 U. S. C. § 2518(10)(a). The judge is trusted with the facts upon which the search is based, as well as with a significant degree of control over the evidence seized. That Congress' judgment on the appropriateness of judicial supervision has proved sound seems most eloquently demonstrated by the Government's frequent use of the 1968 Act. Court approved wiretaps increased from 271 in 1969 to 583 in 1970; applications to federal judges increased during the same period from 34 to 183. In this two-year period, only one application to a federal judge was denied.<sup>28</sup>

It would obviously be desirable for the Attorney General personally to authorize each national security surveillance. Requiring judicial review does not prevent the Attorney General from adopting, and adhering to,<sup>29</sup> a policy of personally authorizing each surveillance. Judges would simply review his hopefully consistent judgments to prevent errors, be they aberrant or persistent. Congress

<sup>28</sup>See Admin. Office U. S. Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications 5 (April 1971), and id. at 4 (April 1970).

<sup>29</sup>The Government states that "the Attorney General personally

authorizes each national security surveillance. "and attributes to this an alleged "significant" decline in the number of such surveillances authorized during the last 10 years. Gov't Brief, p. 27 n.10. The Government's practice has, however, varied, and officers other than the Attorney General have authorized warrantless winetaps. See infra at 56. Alderman v. United States, 394 U. S. 165, 170 n.3 (1969). Nothing would prevent a reversion to prior practice, or for that matter, the delegation of authority, for example, to United States Attorneys. Just as the President can delegate his tasks to subordinate officials, "the Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." 28 U. S. C. § 510.

sought to increase uniformity and accountability in the Omnibus Crime Control and Safe Streets Act of 1968 by requiring the Attorney General or an Assistant Attorney General to authorize all applications for eavesdrops. 18 U. S. C. § 2516(1). Immediately after so providing, however, the Act requires that the applications be made to federal judges, a requirement recognized in the Senate Report as being "in accord with the practical and constitutional demand that a neutral and detached authority be interposed between the law enforcement officers and the citizen (Berger v. New York . . .; Katz v. United States ...). Judicial review of the decision to intercept wire or oral communications will not only tend to insure that the decision is proper, but it will also tend to assure the community that the decision is fair." S. Rep. No. 1097, 90th Cong., 2d Sess. 97 (1968). Foreknowledge that an intrusion will have to be justified to a federal judge will facilitate due consideration by the Government of the reasons for, and evidence supporting, a prospective search. Under the practice suggested by the Government, there need be no such careful scrutiny. As the Circuit Court observed: "this record is devoid of any showing that any presentation of information under oath was ever made before, or any probable cause findings were ever entered by any administrative official-let alone any judge." 444 F. 2d at 667.

Legislative oversight, relied on in Great Britain, is also desirable, but once again also consistent with judicial supervision. To the extent practicable, the President and the Attorney General should be accountable for their eavesdropping policies to the legislature. But meaningful Congressional scrutiny of the grounds upon which national security eavesdropping is authorized would be impossible, if the Government has correctly judged the dangers involved in disclosing such information. Congressmen are no more trustworthy with secrets than federal judges, and the

possibility of leaks would undoubtedly be greater in the deliberations of our most public branch of government, than from ex parte motions in judicial chambers.

Legislative and judicial review of eavesdropping practices serve entirely different purposes. The legislature is concerned with general policies and practices, and hence acts intermittently, on the basis of generalized representations. Also it is answerable directly to the people, and therefore likely to respond to the majority will. The federal courts are mandated to protect the rights of individuals, and must act in every case to assure that no policy or practice, no matter how popular, causes an intrusion that violates Constitutional rights.

That Great Britain requires no similar judicial role reflects its system of legislative supremacy. The present British practice, which allows wiretaps without judicial warrant in national security cases, for serious crimes and for customs violations,<sup>31</sup> is precisely the sort of development the

<sup>31</sup>Report of the Committee of Privy Councillors Appointed to Inquire into the Interception of Communications, paras 58-66 (1957). Until recently, it was also routine to tap the telephones of members of Parliament on order of the executive. Parliamentary Debates, Vol. 736, 634-41. The practice of tapping members' telephones was

discontinued during the Wilson Government.

warrant procedure is necessary to check executive abuse, in part because the Attorney General is accountable to the President, and through him to the people, for authorizing surveillances. This claimed protection is meaningless, since the Government clearly intends to keep secret the extent, scope and subjects of such intrusions. To the extent public approval is relevant, moreover, it is an entirely inappropriate standard by which to define constitutional rights. In times of great internal stress the majority may well favor curtailing the exercise of rights. See, e.g., the poll reported in Time, April 27, 1970, p. 19, in which 76% of the respondents answered "no" to the question "as long as there appears to be no clear danger of violence, do you think any group, no matter how extreme, should be allowed to organize protests against the Government?" As Mr. Justice Harlan has noted, "the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will ... "Bivens v. Six Unknown Named Agents, supra at 407 (concurring opinion). Apparently, the Government has abandoned this argument.

framers of our Constitution sought to avoid by adopting the Bill of Rights and forming an independent judiciary to assure its preservation. In short, the British Executive Branch does numerous things that our Executive Branch cannot do because of the Fourth Amendment. Britain's is a national government of inherent powers. Ours is not. Britain's courts are not the ultimate protectors of individual liberties secured under a written Constitution. Ours are.

5. No practice of warrantless electronic surveillance ever existed that could support the Government's claim that the fruits of such searches can be used as evidence in criminal cases.

The Government asserts that "Presidentially-authorized surveillance in national security cases involving threats to overthrow or subvert the government by unlawful means has been undertaken by successive Presidents over a period of thirty years." Gov't Brief, pp. 16-17. And it argues that the exercise of this power supports its existence. Id. at 18.

The fact is that there has been no uniform authority since 1940 to use warrantless surveillance in connection with domestic activities. Also, prior usage cannot validate clearly unconstitutional activity; indeed, the practices during the last 30 years included surveillance for purposes that the Government seems now to concede are unlawful. The only practice that is relevant in this case is that which has been

<sup>\*\*</sup>In Britain wiretapping faises no constitutional questions at all. "[O]nly in the United States can [wiretapping] raise a constitutional issue as such." Wade & Phillips, Constitutional Law 581 (8th ed. 1970). Neither does opening personal mail, a fact upon which the Privy Councillors relied in approving of wiretapping. Report of the Privy Councillors, supra n.31, para. 14(b). In this country, personal mail is protected from government intrusion both by statute, 18 U. S. C. § 1703, and by the Fourth Amendment, Lustiger v. United States, 386 F. 2d 132 (9th Cir. 1967), cert. denied, 390 U. S. 951 (1968).

followed with respect to the use of information obtained through warrantless wiretaps as evidence in criminal trials. And the single uniform element in executive eavesdropping practices since the 1937 and 1939 decisions in Nardone v. United States has been the premise that the fruits of warrantless eavesdropping may not be "divulged" through such use.

The first President to authorize wiretapping was Franklin Roosevelt. He did so in 1940, after this Court had decided that evidence secured by government wiretaps was inadmissible in criminal cases in view of the provisions of the Communications Act of 1934, Nardone v. United States, 302 U.S. 379, and that this exclusionary rule extended to evidence based upon information gained or derived from intercepted messages, Nardone v. United States, 308 U. S. 338. A world war was under way, causing great concern in the Executive Branch and Congress that wiretapping was outlawed even in connection with wartime activities of foreign powers.33 President Roosevelt's directive of May 21, 1940, stemmed directly from this concern. He stated his agreement with the Court's decision to apply to federal officers the wiretapping prohibition of the 1934 Act. He accepted, without qualification, the aspect of Nardone relating "to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases"; and he accepted the judgment, "under ordinary and normal circumstances," that "wiretapping by Government agents should not be carried out for the excellent reason that it is almost bound to lead to abuse of civil rights." Transcript of Record, p. 69.

Roosevelt refused, however, to accept "any dictum" in Nardone as applying "to grave matters involving the defense of the nation." Other nations, he wrote, had formed

<sup>38</sup> See generally Theoharis & Meyer, The "National Security". Justification for Electronic Eavesdropping: An Elusive Exception, 14 Wayne L. Rev. 749, 757-60 (1968).

"fifth columns" that were preparing for, and were engaged in, sabotage. With this danger in mind, he authorized Attorney General Jackson to order the interception of the communications "of persons suspected of subversive activities against the Government of the United States, including suspected spies." He added, significantly, that these investigations should be held "to a minimum," and limited "insofar as possible to aliens." Id.

The directive secured by Attorney General Clark from President Truman in 1946 was far broader than the one issued by President Roosevelt. In quoting from the Roosevelt order, Attorney General Clark omitted the sentence ordering that eavesdropping be held to a minimum, and limited insofar as possible to aliens. Citing "the present troubled period in international affairs," and "an increase in subversive activities here at home," the Attorney General found it necessary to take the investigative measures referred to in the Roosevelt directive. In addition, he noted, "the country is threatened by a very substantial increase in crime," and stated that, while reluctant to suggest and use these measures "in domestic cases, it seems imperative to use them in cases vitally affecting the domestic security, or where human life is in jeopardy." Id. at 70-71.34

Apparently, Attorneys General McGrath, McGranery and Brownell followed a policy similar, in principle at least, to that authorized by President Truman.35 It was conceded in 1966, however, that under Presidents Kennedy

195, 199-200 (1954).

<sup>34</sup> Attorney General Clark, now Mr. Justice Clark (retired), in commenting on the Omnibus Crime Control and Safe Streets Act of 1968, after questioning the constitutionality of the "emergency" provisions of the Act, concluded that while electronic devices should be used "for law enforcement . . [they] must be narrowly circumscribed and strictly construed. No invasion without prior [court] authorization should be permitted, save in the most exigent circumstances, none of which I can now envisage." Clark, Wiretapping and the Constitution, 5 Calif. West. L. Rev. 1, 6 (1968). 35 Brownell, Public Security and Wire Tapping, 39 Cornell L. Q.

and Johnson the FBI was authorized to wiretap "when reguired in the interest of internal security or national safety including organized crime, kidnapping and matters wherein human life be at stake." Supplemental Memo. for the United States, Black v. United States, 385 U. S. 26 (1966). in Hearings on S. 928, before the Subcom, on Admin. Prac. and Proc. of the Sen. Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 1, at 34 (1967). The practice authorized was changed again, sharply, during the Johnson Administration, under Attorney General Ramsey Clark; wiretaps were allowed only as to matters "directly affecting the national security," not including such matters as organized crime. Hearings, supra at 56. In addition, further differences in practice existed under Attorneys General who, in principle, may have purported to follow the same policy with respect to wiretapping. For example, wiretapping has been allowed by some Attorneys General in connection with investigations completely unrelated to "national security."36

This history of prior use undercuts the Government's argument. To justify so grave a business as warrantless eavesdropping, a prior practice would have to convey unambiguously that the specific authority sought would, if granted, continue an accepted activity. Prior practice is patently ambiguous in this respect, because it includes periods during which the specific authority here claimed would have been disallowed (under Roosevelt and probably during the latter years of the Johnson Administration), as well as periods during which even broader authority was provided (under Truman, Kennedy and the early Johnson

threat); United States v. Kolod, 390 U. S. 136 (1968) (interstate threat); United States v. Granello, 386 U. S. 1019 (1967) (tax); United States v. O'Brien, 386 U. S. 345 (1967) (customs); United States v. Schipani, 385 U. S. 372 (1966) (tax); Black v. United States supra (tax); United States v. Borgese, 235 F. Supp. 286 (S. D. N. Y.), aff'd, 372 F. 2d 950 (2d Cir. 1967) (gambling); United States v. Baker, 262 F. Supp. 657 (D. C. D. C. 1966) (larceny. and tax).

years). That authority for wiretaps in domestic criminal cases existed during a substantial part of the period involved shows that the practice was lawless, and based on a theory different from the one now advanced by the Government.

The theory under which eavesdropping has in fact been conducted since 1940 demonstrates how radical a change the Government now suggests. Soon after President Roosevelt issued his 1940 directive, Attorney General Jackson authorized wiretaps in limited circumstances on the argument (implicit in Roosevelt's memorandum) that section 605 of the Communications Act precluded only interception and divulgence—that interception alone of telephone messages did not violate the Act. See 87 Cong. Rec. 5764 (1940); Westin, The Wire-Tapping Problem: An Analysis and A Legislative Proposal, 52 Colum. L. Rev. 165, 168-69 (1952). Under this theory, it made no difference what crime or activity was being investigated; the Act alfowed interception but not divulgence. Moreover, since Olmstead v. United States, supra, had held that the Constitution did not prohibit wiretapping, the only restraint on its use was the particular policy adopted by each President and Attorney General. This accounts for the diversity in practice with respect to the use of wiretapping for investigation. On the other hand, the theory contrived by Roosevelt and Jackson also accounts for the uniform acceptance by Attorneys General from 1940 until the present of the position that information obtained through wiretaps could not be used as evidence.

Prior to the present case, the Government has repeatedly conceded the inadmissibility of evidence obtained through wiretapping, even in espionage prosecutions. See, e.g., United States v. Coplon, 185 F. 2d 629 (2d Cir. 1950), cert. denied, 342 U. S. 926 (1952), and cases cited supra, n. 36.

There are, therefore, two essential components of the Government's claim with respect to wiretapping practices as a precedent: the use of wiretapping to gather information; and the use of information so gathered, or its fruits, as evidence in criminal cases. As to the use of wiretapping to gather information, a wide variety of practices developed, none of which has received either legislative or judicial approval. As to whether the informational fruits of such wiretapping may be used as evidence—the issue in this case—there has indeed been a uniform practice. It is that information gathered through warrantless wiretaps may not be so used.

 Congress has not recognized executive power to engage in warrantless electronic surveillance as conducted in this case.

The Government contends that, in section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968, Congress "excepted from the requirement that a warrant be obtained for electronic surveillance certain categories of cases dealing with foreign and domestic intelligence and security." Gov't Brief, p. 28. But the clear language and

States, supra. See the similar representations made to this Court and referred to in Berger v. New York, supra at 62.

legislative history of the statute refute this construction. Section 2511(3) does except from the requirements of the 1968 Act certain types of "national security" eavesdropping in which the President may have the power to engage. It does not confer any power. It merely provides that, if the President has any constitutional power to eavesdrop without warrant in certain areas, the Act should not be interpreted to disturb that power. To construe section 2511(3) as an affirmative grant of power would ignore Congress' persistent refusal since 1934 to recognize executive power to eavesdrop, and would raise grave constitutional questions, which should be avoided. See, e.g., Kent v. Dulles, 357 U. S. 116 (1958). Even assuming, however, that Congress did recognize executive authority to eavesdrop without warrant in certain situations, it is clear that this case involves none of the situations contemplated. The present search is invalid under any construction of the Act.

Since 1934, Congress has evidenced its opposition to wiretapping. In the Communications Act of that year, Congress outlawed all wiretaps, including those by federal law enforcement officials. Commencing in 1938 and repeatedly during the 1940's, 1950's and 1960's, the Department of Justice sought congressional authority to eavesdrop, especially in "national security" and organized crime cases. In the early 1940's and 1950's most of the bills were introduced as war measures. Other efforts sought authority in peacetime to wiretap with prior judicial supervision, in

<sup>&</sup>lt;sup>38</sup>The bills to revise § 605 introduced prior to 1958 are listed in Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess., pt. 4, pp. 781-1031 (1959).

<sup>&</sup>lt;sup>89</sup>E.g., 88 Cong. Rec. A289 (1942).; 88 Cong. Rec. 4598 (1942). <sup>40</sup>H. R. 8649, 83d Cong., 1st Sess. (1953); H. R. 762, 84th Cong., 1st Sess. (1955); S. 1086, 87th Cong., 1st Sess. (1961); H. R. 479, 82d Cong., 1st Sess. (1951); Hearings on Wiretapping for National Seccurity before Subcomm. No. 3, House Committee on the Judiciary, on H. R. 408, 83d Cong., 1st Sess. 86 (1953).

and some sought to avoid prior judicial supervision, assertedly because of fear of information leaks and prejudicial delay.41 Every bill proposed prior to 1968 either failed or was withdrawn, principally because of congressional concern as to the meaning of "national security,"42 and the fear of further government abuse of any power conferred. 43

By the Act of 1968, Congress for the first time expressly authorized electronic surveillance by federal, state and local authorities in a variety of situations involving certain specific criminal offenses. 18 U. S. C. § 2516(1)(a). Before eavesdropping is allowed, however, an application must be made to a judge stating, among other things, the grounds for believing that the subject should be intruded upon, and why electronic surveillance is necessary. 18 U. S. C. §§ 2516 and 2518. The judge may issue an order authorizing a surveillance where he finds "probable cause" to believe that one of several serious offenses has been or is about to be committed. The order must contain several particulars that narrow the power granted, and may not authorize interceptions for longer than necessary, and in no event for longer than 30 days. 18 U.S. C. § 2518(4)

42 The early bills used the term "national defense" and in defining that term referred to "sabotage, treason, seditious conspiracy, espionage, violations of neutrality law, or in any other manner..." Report of Committee of the Whole House, accompanying H. J. Res. 571, 76th Cong., 3d Sess. (1940); H. J. Res. 273; 77th Cong., 2d Sess.

<sup>41</sup> Hearings on S. Rep. No. 1304, 76th Cong., 3d Sess. (1940); H. R. Rep. No. 2576, 76th Cong., 3d Sess. (1940); H. R. Rep No. 2048, 77th Cong., 2d Sess. (1942); Hearings on Wiretapping for National Security, Subcomm. No. 3 of the House Comm. on the Judiciary, 83d Cong., 1st Sess. (1953); Hearings on S. 2813 and S. 1495, before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. 16-17 (1962). See generally Theoharis & Meyer, supra at 764; Brownell, supra at 54; Rogers, The Case for Wiretapping, 63 Yale L. J. 792, 797 (1954).

<sup>&</sup>lt;sup>43</sup>Theoharis & Meyer, supra at 759. Hearings on S. 928 before the Subcomm. on Administrative Prac. and Proc. of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 1, at 34 (1967).

- and (5). An exception to this warrant procedure is allowed under § 2518(7) where any investigative or law enforcement officer, especially designated by the Attorney General or by the principal prosecuting attorney of any state or subdivision, "reasonably determines that—
  - (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
  - (b) there are grounds upon which an order could be entered under this chapter to authorize such interception.<sup>44</sup>

In such event the law enforcement officer may proceed to intercept communications, provided that a court order is sought within forty-eight hours after the interception begins. Interceptions obtained without an authorizing order issued in accordance with these provisions are deemed unlawful, and an inventory must be served on the subjects. 18 U. S. C. § 2518(8)(d).

Section 2511(3) must be read in conjunction with the requirements of the 1968 Act. The section provides that "nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against" certain foreign and internal threats to the nation's security. Congress clearly did not contemplate that a warrant could constitutionally be dispensed

<sup>&</sup>lt;sup>44</sup>Significantly, the provisions creating this "emergency" power came closest to defeat, prevailing in the Senate by only a seven-vote margin: 44-37. 114 Cong. Rec. 14699 (1968).

with whenever an activity that potentially threatened our security was being investigated. It specifically provided for judicial supervision in connection with investigations of espionage, sabotage and treason, for example, and allowed warrantless surveillance only in emergencies, for no more than a 48-hour period. At most, therefore, the provision can be interpreted as a neutral pronouncement, reflecting no congressional judgment on the content of the President's "constitutional power." This interpretation is strongly supported by the following authoritative exchange between Senators Hart, McClellan and Holland, 114 Cong. Rec. 14751 (1968), in connection with the phrase "clear and present danger to the structure or existence of the Government":

MR. HART. [I]f, in fact, we are here saying that so long as the President thinks it is an activity that constitutes a clear and present danger to the structure or existence of the Government, he can put a bug on without restraint, then clearly I think we are going too far. . . .

MR. HOLLAND. Mr. President, I think that the distinguished Senator is unduly concerned about this matter.

The section from which the Senator has read does not affirmatively give any power. It simply says, and I will not read the first part of it because that certainly says that nothing shall limit the President's constitutional power, but the part from which the Senator has read continues in the same spirit. It reads:

'Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against.' And so forth. We are not affirmatively conferring any power upon the President. We are simply saying that nothing herein shall limit such power as the President has under the Constitution. If he does not have the power to do any specific thing, we need not be concerned. We certainly do not grant him a thing.

There is nothing affirmative in this statement. Mr. McClellan. Mr. President, we make it understood that we are not trying to take anything away from him.

Mr. Holland. The Senator is correct.

MR. HART. Mr. President, there is no intention here to expand by this language a constitutional power. Clearly we could not do so.

Mr. McClellan. Even though intended, we could not do so.

MR. HART. A few days ago I wondered whether we thought that we nonetheless could do something about the Constitution. However, we are agreed that this language should not be regarded as intending to grant any authority, including authority to put a bug on, that the President does not have now.

Therefore, Congress in effect said in section 2511(3) that, if the President does possess power to eavesdrop without a warrant in some circumstances to protect against an overthrow of the government by force or against any other clear and present danger to the structure or existence of the government, then neither section 605 of the 1934 Act nor the relevant provisions of the Omnibus Crime Control and Safe Streets Act of 1968 should be construed to limit such power. Under this most natural reading, Congress neither granted nor recognized any specific executive power to eavesdrop for the purposes described.

To the extent that section 2511(3) reflects a congressional judgment as to the areas in which the President may have power to eavesdrop without warrants, it strongly indicates that no such power extents to strictly domestic affairs. The Senate Committee Report contains the following explanation of the national security provisions, expressly distinguishing between "the field of domestic affairs," on the one hand, and "international relations and internal security," on the other:

## NATIONAL SECURITY

It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for acquisition of counter intelligence against the hostile action of foreign powers. Nothing in the proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake.

S. Rep. No. 1097, 90th Cong., 2d Sess. 69 (1968). (Emphasis added.)<sup>45</sup>

Section 2511(3) provides no support for the Government in this case for another reason. It provides that, "[t]he contents of any wire or oral communication intercep-

<sup>45</sup> In its effort to support a broad reading of section 2511(3), the Government omitted from an extensive reference to the Senate Committee Report, Gov't Brief, p. 29, the highly significant, italicized words in the following sentence: If evidence secured through eavesdropping could not be used, "individuals seeking to overthrow the Government, including agents of foreign powers and those who cooperate with them, could not be held legally accountable when evidence of their unlawful activity was uncovered incident to the exercise of this power by the President." S. Rep. No. 1097, 90th, Cong., 2d Sess. 94 (1968). (Emphasis added.)

ted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable .... " (Emphasis added.) This provision accepts the principle that, whatever may be the President's power to gather information, he cannot use as evidence information gathered in violation of the Fourth Amendment. As to what is reasonable, Congress explicitly stated that the eavesdropping provisions of the Act were "drafted to meet ... [the] standards [delineated in Berger v. New York] and to conform with Katz v. United States . . . . " S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968). The Government relies on a statement in the Senate Committee Report to the effect that the reasonableness of an interception should be "based on an ad hoc judgment taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself (Carroll v. United States, 267 U. S. 132 (1925))." Id. at 94. This statement was not meant to disturb the rule in Katz. Carroll v. United States rests on a recognized exception to the warrant requirement, based on practical law-enforcement needs. The · Senate Committee's reference simply sought to reinforce the general proposition stated in section 2511(3) that the Act should not be read to preclude warrantless surveillance where the Constitution would allow it. Thus the Report continues, after referring to the standard in Carroll: "The possibility that a judicial authorization for the interception could or could not have been obtained under the proposed ch. pter would only be one factor in such a judgment." Id. (Emphasis added.) The District and Circuit Courts did not rely on the 1968 Act in declaring the fruits of the present search inadmissible. Rather, they relied on the constitutional principle implicit in Carroll—that warrants are generally required-and on an examination of the facts and circumstances as alleged by the Attorney General, which

revealed no basis for an exception to the warrant requirement.

Whatever interpretation may be placed on section 2511 (3), the present search is invalid. The Government claims to have acted under that part of the statute that leaves undisturbed the President's power to take measures "to protect be United States against the overthrow of the Government by force or by other unlawful means, or against any other clear and present danger to the structure or existence of the Goverment." But the Attorney General did not allege facts or conclusions sufficient to establish that he acted pursuant to this provision. His affidavit stated that the wiretaps "were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." Gov't Brief, p. 3. First, the statutory provision relied on says nothing about authority to gather "intelligence information" in connection with internal security; intelligence information gathering is referred to only in connection with activities of foreign powers. Second, the affidavit fails to allege either that the efforts against which wiretapping was directed sought "the overthrow of the Government by force or other unlawful means," or that the efforts posed "any other clear and present danger" to the Government. Instead, the affidavit simply refers to "attempts" or "domestic organizations" to attack and subvert the government. The statutory language that the Attorney General omitted from his affidavit is highly material, since it at least requires him to allege in good faith that he believed the "attempts" involved dangerous activities. The defect in his affidavit is analogous to the failure by an affiant seeking a conventional search warrant to allege that a crime had been, or was being, committed. It is clearly fatal to the search's

legality. See, e.g., Thomas v. United States, 376 F. 2d 564, 567 (5th Cir. 1967).

7. Whatever authority the President may have to utilize warrantless electronic surveillance with respect to the activities of foreign powers, there is no support for such surveillance of purely domestic activities.

In a final effort to justify the inordinate power it seeks, the Government assumes that the Attorney General could order warrantless electronic surveillance for foreign intelligence purposes and then use the information obtained as evidence. It then argues that "no sharp and clear distinction can be drawn between 'foreign' and 'domestic' information," and that any effort to "compartmentalize national security into rigid separate segments of 'foreign' and 'domestic' ignores the realities . . ." Id. at 34.

The Government assumes too much. Whether the fruits of warrantless wiretaps used to gather foreign intelligence may be used as evidence is a question of great importance and difficulty. This Court refused an opportunity to review any aspect of the issue in *United States* v. Clay, 430 F. 2d 165 (5th Cir. 1970), reversed on another ground, 403 U. S. 698 (1971). In fact, the Fifth Circuit in Clay implicitly recognized that, whereas foreign intelligence surveillance is not prohibited by the Communications Act of 1934, its fruits may be inadmissible as evidence. Also, the District and Circuit Courts in the present case did not recognize, explicitly or implicitly, that foreign intelligence eavesdrop-

Control and Safe Streets Act of 1968 in rejecting the contention that foreign intelligence wiretaps were forbidden. 430 F. 2d at 171. It held that the defendant could not see the log involved, because it had properly been determined that the tap had been made for foreign intelligence gathering, and because "no use of the fifth log was made in this case against defendant. It played no part in his conviction and our in camera scrutiny thereof thoroughly convinces us that defendant was not prejudiced thereby." Id.

ping can be used to gather admissible evidence. They assumed it, arguendo, in rejecting the contention that there is a national security exemption from the warrant requirement in wholly domestic situations. See Transcript of Record, pp. 30-32, 63-64. Indeed, the Solicitor General only recently conceded, in oral argument, that such surveillance is unlawful, a concession this Court refused to accept. See Giordano v. United States, 394 U. S. 310, 313 n.1 (1969).

: It is appropriate here, for argument's sake, to assume that the fruits of electronic surveillance undertaken to protect against foreign threats are admissible as evidence in criminal cases, even where such surveillance fails to comply with traditionally imposed constitutional limitations. It is imperative, however, to do so tentatively and with caution. For if, as the Government contends, it is impossible to distinguish between foreign and domestic threats to the nation's security, then the assumption that evidence is admissible though secured through warrantless eavesdropping in foreign affairs must be rejected. If no acceptable rationale can be developed for allowing prosecutorial use of intelligence gathering eavesdropping directed at foreign powers and their agents, while disallowing such use of intelligence gathering eavesdropping directed at domestic activities, then Fourth Amendment principles require that the prosecutorial use of all such eavesdropping be proscribed. In this, as in every other situation in which extraordinary power has been granted to the President in the field of foreign affairs, it must only be done if the foreign aspect of the power sought is distinguishable from other aspects that the law requires to be governed by normal standards. Otherwise, the President's special powers would swallow up the fundamental rights written to protect Americans (though not foreign governments) from the exercise of arbitrary power.

The fact is that, contrary to the Government's present contention, the distinction between foreign and domestic

activities is sufficiently viable to justify deferring the question whether electronic intelligence gathering aimed at foreign powers or activities may also be used to collect evidence for criminal trials. In United States v. Curtiss-Wright Export Co., supra, for example, this Court was presented with the issue whether a resolution of Congress authorizing the President to institute at his discretion a prohibition against the sale of arms to foreign belligerents was an unconstitutional delegation of legislative authority. The Court assumed, without deciding, that the resolution would have been invalid if it had been confined to internal affairs, and concluded that, even so, it was valid as a delegation relating to matters "entirely external to the United States, and falling within the category of foreign affairs." 299 U. S. at 313. To reach this conclusion the Court adopted the position, id. at 319, that there exist fundamental differences between the powers of the federal government in respect to foreign and domestic affairs:

Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.

In Curtis's-Wright, and in the many other decisions where this Court sustained an especially broad exercise of power in foreign or external matters, it did so because it concluded (as the government undoubtedly there contended) that the President's authority in foreign matters was especially broad. See, e.g., United States v. Belmont, supra at 330-31; United States v. Pink, supra at 229-30; Chicago & So. Air

Lines v. Waterman Steamship Corp., supra at 109-11; Oetjen v. Central Leather Co., 246 U. S. 297, 302 (1918). A necessary premise for such a conclusion is that the distinction between foreign and domestic affairs has vitality and is a serviceable guideline for the exercise of power by the different branches of the federal government. See also Youngstown Sheet & Tube Co. v. Sawyer, supra at 635 n. 1 (concurring opinion of Jackson, J.).

Federal statutes and judicial decisions in the area of national security specifically reflect the viability of a distinction between foreign and domestic threats. For example, the Subversive Activities Control Act requires registration by Communist organizations which, among other things, are "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . ." 50 U. S. C. § 782(3). (Emphasis added.) 11 In rejecting the argument that the registration requirement of the Act violated the defendant's First Amendment rights, the majority opinion by Mr. Justice Frankfurter in Communist Party v. Subversive Activities Control Board, 367 U. S. 1, 104 (1961), stressed the foreign nature of the threat, and the correspondingly greater freedom which must be given to Congress:

It is argued that if Congress may constitutionally enact degislation requiring the Communist Party to register, to list its members, to file financial statements, and to indentify its printing presses, Congress may impose similar requirements upon any group which pursues unpopular political objectives or which expresses an unpopular political ideology. Nothing which we decide here remotely carries such an im-

<sup>&</sup>lt;sup>47</sup>See also the distinction between foreign and domestic affairs drawn in the Foreign Agent's Registration Act, 22 U. S. C. §§ 611-21, and 18 U. S. C. § 2386.

plication. The Subversive Activities Control Act applies only to foreign-dominated organizations which work primarily to advance the objectives of a world movement controlled by the government of a foreign country.

Particularly pertinent in this context is the American Bar Association's adoption of the very distinction that the Government here claims cannot be made,48 and that it did so with awareness and a belief in the distinction's tenability.49 Furthermore, Congress evidenced its conviction that the distinction was both necessary and could be drawn by providing separately in section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 that the

to consider amendments; explained the distinction during the floor debates:

I call the House's attention to the fact that 3.01 and 3.02, which relate to national security, provide for a national security exception to the court order and warrant procedure which is the bedrock provision of the standards with respect to ordinary

It is essentially [sic] in this debate . . . to understand that this exception relates only to cases where national security is threatened by foreign powers or activities. The exception does not relate to domestic threats or subversion.

This distinction is explicitly clear from the standard and from the commentaries. The suggestion that domestic security may be involved is completely beside the point of this discussion.

Transcript of Record, Minutes of House of Delegates, p. 71 (Feb. 9, 1971). (Emphasis added.)

<sup>48</sup>Part 3.1 of ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance, p. 4, 120-21 (1971), provides that, "The use of electronic surveillance techniques by appropriate federal officers for the overhearing or recording of wire or oral communications to protect the nation from attack by or other hostile acts of a foreign power or to protect military or other national security information against foreign intelligence activities should be permitted subject to appropriate Presidential and Congressional standards and supervision." (Emphasis added.)

19 Mr. Lewis F. Powell, then a member of the Special Committee

President's constitutional powers with respect to foreign activities and with respect to internal security should not be affected by the Act. The recitation of those powers in the same statutory provision does not evidence a legislative belief that they cannot be distinguished. To the contrary, had Congress so believed, it would more reasonably have been expected to lump both areas of activity into one category, such as "national security." But it did not. The statute's language is significantly different in connection with the foreign activities described than with the domestic activities described. Each type of activity is dealt with in a separate sentence. As to internal-security matters, the Presidential power left unaffected relates to the use of unlawful means which pose a clear and present danger; no such limitations are suggested in connection with the threats of foreign powers who, unlike persons engaged in domestic activities, are not subject to normal criminal sanctions.

The Government itself only recently contended that a distinction could be made between its eavesdropping activities aimed at foreign powers and those aimed at uncovering domestic threats. In its Petition for Rehearing in *Ivanov* v. *United States*, No. 11, 1968 Term, p. 1, filed March 1969, the Government requested that this Court reconsider that portion of its decision "which relates to the disclosure to defendants of the results of electronic surveillance relating to the gathering of foreign intelligence information . . ."

There, the Government managed ably to state, id. at 2-3, the distinction it now claims this Court is incapable of formulating:

In presenting this petition, we do not use the term 'national security.' We recognize that that phrase can be given a broad meaning covering such matters as organized crime and internal security. Our submission here is limited to the narrow category of the gathering of foreign intelligence information; i.e.,

matters affecting the external security of the country. . . .

Within that narrow compass, we believe that the decision in these cases poses sufficiently serious problems to the protection of that security that it should be modified to provide for in camera scrutiny by the district court before records of surveillance made in such gathering should be disclosed to defendants.

Finally, to illustrate its argument that domestic and foreign intelligence gathering are inseparably intertwined activities, the Government notes that several hundred international telephone calls were intercepted during the present tap. Gov't Brief, p. 30 n.13. This observation, based on incomplete information never/introduced in the record, is neither an adequate nor a timely allegation that the wiretap was ordered to protect to any extent against the activities of foreign powers. The Attorney General's affidavit filed in the District Court specifically recites that the wiretaps involved were being used to gather information "deemed. necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." Id. at 3. (Emphasis added.) And the Government noted in the District Court that the issue presented "involves the legality only of those electronic surveillances deemed necessary to gather intelligence information to protect the nation from internal attack and subversion . . . ." Gov't Memorandum, filed Dec. 10, 1970, p. 6. Therefore, whatever ambiguities may exist with respect to the difference between surveillance directed at foreign as compared to domestic activities, no difficulty on this score exists here. The tap involved was aimed at domestic activities, and it cannot be supported by the argument that a similar tap on foreign activities would be lawful.

THE DISTRICT COURT PROPERLY REFUSED TO DETERMINE IN CAMERA WHETHER THE FRUITS OF THE INTERCEPTIONS ARE ARGUABLY RELEVANT TO THE PROSECUTION.

The Government concedes that Alderman v. United States, 394 U. S. 165 (1969), requires that the relevance of of illegally seized evidence to a prosecution be determined with the full participation of a defendant aggrieved by the search. See Nardone v. United States, supra, 308 U. S. at 341. It argues, however, that Alderman should be reconsidered, at least as it applies to "national security" cases. It is "adequate" protection for the defendant in this case to allow an in camera determination, the Government argues, because his conversation was intercepted "by happenstance." On the other hand, we are told, many reasons exist for not disclosing material that a judge concludes is not arguably relevant, including the unfortunate possible effects of such disclosure on innocent persons; possible interference with other federal and state prosecutions; and the "dilemma" allegedly forced upon the Government to decide between disclosing information that may be secret or embarrassing, and dropping the case and thereby possibly immunizing the individual from any future prosecution. Moreover, Congress is said to have unambiguously opposed automatic disclosure in two recent statutes, consequently making even stronger the case for reconsideration. Alderman should be viewed, the Government contends, as an exercise of this Court's supervisory power, which is subject to legislative overruling. But even if viewed as a constitutional decision, reconsideration is claimed appropriate and necessary.

A. The Decision in Alderman Is of Constitutional Dimension and Established the Proper Procedure for Resolving the Issue of Whether Illegally Seized Evidence Has Tainted the Government's Case.

The Court in Alderman carefully considered the interests at stake in deciding that an adversary proceeding was required. That it "weighed" arguments against disclosure does not signify that the decision had no constitutional basis. Quite the contrary. Careful consideration of all countervailing factors indicates only that the decision reached is sound, whatever may have been the basis upon which the Court proceeded.

Alderman rests squarely on the Fourth Amendment. When this Court rests a decision on its supervisory power over the federal courts it does so unambiguously. B.g., McCarthy v. United States, 394 U. S. 459 (1969); Marshall v. United States, 360 U. S. 310, 313 (1959); Mallory v. United States, 354 U. S. 449 (1957); Offut v. United States, 348 U. S. 11, 13 (1954); McNabb v. United States, 318 U. S. 332, 340 (1942). To do otherwise would create undesirable uncertainty as to a decision's applicability in the state courts, the propriety of collateral attacks based on the principle announced, and the scope of Congress' authority to legislate on the issue. In Alderman the Court did not mention its supervisory power, and made no hint that its decision would apply only in the federal courts. It concluded, in fact, that an in camera proceeding on the issue of relevance was so patently deficient, as compared to an adversary proceeding, that it would "be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." 394 U.S. at 184. (Emphasis added.) This enlightening language was repeated in Taglianetti v. United States, 394 U. S. 316, 317 (1969), where the Court distinguished Alderman "because the in camera procedures at issue there [in Alderman] would have been an inadequate

means to safeguard a defendant's Fourth Amendment rights."

In camera adjudication is constitutionally inadequate for determining the relevance of illegally seized evidence. The trial judge, by definition neutral and detached, is obviously unfamiliar with the facts behind a case and may therefore fail to see relevance where a defendant could convincingly demonstrate its existence. 50 Of course, "adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which. the Fourth Amendment exclusionary rule demands." 394 U. S. at 184. Implicit in the need for an adversary proceeding to determine taint, moreover, are the accused's Sixth. Amendment rights of confrontation and cross-examination which should be limited upon proof of only the "clearest and most compelling considerations." Dennis v. United States, 384 U.S. 855, 973 (1966). The Court of Appeals: in this case examined the material submitted by the Government and concluded that it could not be certain whether the Government had derived prosecutorial benefit from this illegal search. 444 F. 2d at 668.

<sup>50</sup> As Mr. Justice White reasoned for the Court in Alderman, supra at 182 (footnotes omitted):

An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case.

The Government refers to situations in which nondisclosure has heretofore been found acceptable. Most of these were specifically considered in Alderman, however, and distinguished because "in both the volume of the material to be examined and the complexity and difficulty of the judgments involved, cases involving electronic surveillance will probably differ markedly from those situations . . . . where in camera procedures have been found acceptable to some extent." 394 U. S. at 182 n.14.51 It is far easier, for example, for a judge to determine what evidence in the prior statement of a witness is relevant to the witness' direct examination, than to determine the relevance of a recorded conversation to a prosecution. Even with the helpful focus of testimony on direct, however, the Court noted that it is not "realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legititmate purposes, however conscientiously made, would exhaust the possibilties," citing Dennis v. United States, supra, 384 U. S. at 975. Other situations in which nondisclosure was allowed relate to whether an in camera proceeding is appropriate to settle the legality of a surveillance, see Giordano v. United States, supra at 314 (concurring opinion of Stewart, J.), and to whether it is adequate for a District Court to identify "only those instances of surveillance which petitioner had standing to challenge . . . ". after doublechecking "the accuracy of the Government's voice identifications," Taglianetti v. United States, supra at 317. These decisions, virtually contemporaneous with Alderman, stand only for the proposition that Alderman requires no more than the disclosure of illegally seized

<sup>51</sup>The Court referred to Dennis v. United States, supra (disclosure of grand jury minutes subject to in camera deletion of "extraneous material"); Palermo v. United States, 360 U. S. 343 (1959) (disclosure of documents to defense under the Jencks Act, 18 U. S. C. § 3500); and Roviaro v. United States, 353 U. S. 53 (1957) (disclosure of informant's identity).

evidence to defendants with standing. It is conceded here that defendant has standing, and we are assuming in this argument that the seizure was illegal.

The dangers referred to by the Government are largely imagined, and of its own making. We of course share the Government's commendable sensitivity for the rights of innocent persons whose conversations may be disclosed or who may be referred to in such conversations, a sensibility the Government unaccountably suppressed in approaching the principal question before this Court. It is also of grave concern that important federal and state prosecutions may be adversely affected by disclosures of illegally seized evidence. No evidence of such consequences is cited, however, where a protective court order was obtained, and the incidents referred to by the Government are unpersuasive. The Court in Alderman made it emphatically clear that its decision did not mean "that any defendant will have an unlimited license to rummage in the files of the Department of Justice." 394 U.S. at 185. "It must be remembered that disclosure will be limited to the transcripts of a defendant's own conversations and of those which took place on his premises. It can be safely assumed that much of this he will already know, and disclosure should therefore involve a minimum hazard to others." Id. at 18485. The Court of Appeals in this case took pains to make clear that only the specific conversations in which the defendant was overheard should be disclosed. 444 F. 2d at 669. As to the possibility that disclosure may hurt other persons, "the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials that may be entitled to inspect. See Fed. Rules Crim. Proc. 16(e). We would not expect the district courts to permit the parties or counsel to take these orders lightly." Id. at 185.

The most effective way to protect the innocent from harmful disclosures would be to spare them from illegal intrusions. The most effective way to avoid undermining important criminal cases would be to gather intelligence information through constitutionally permissible means. And the way out of the dilemma in which the Government finds itself—to disclose possibly embarrassing or secret material, or to dismiss prosecutions—is to avoid it entirely. The alleged dangers to innocent parties in criminal cases, and the dilemma of disclosing or dismissing, are always present when the Government illegally seizes material that is relevant to a prosecution. See Alderman, supra at 181. The Government can avoid the marginal added dangers caused by disclosure to determine relevance by refraining from the illegal conduct that triggers such inquiries.

That the search here involved assertedly relates to the "national security" is irrelevant. This Court has consistently held that the Government must choose in such cases between disclosure and dismissal of the prosecution. ."[I]t is unconscionable to allow . . . [the Government] to undertake prosecution and then invoke its governmental. privilege to deprive the accused of anything which might be material to his defense . . . " Jencks v. United States, 353 U. S. 657, 670 (1957). See also United States v. Coplon, supra. In Alderman, the Court reaffirmed this rule, not only with respect to internal security matters, but also as to defendants charged with spying for a foreign power. See Ivanov v. United States and Butenko v. United States, decided with Alderman. The Government itself, in its Petition for Rehearing in Ivanov, p. 1, explicitly disavowed requesting in camera hearings as to relevance in national security cases, but limited its request to "that portion of the decision which relates to the disclosure to defendants of the results of electronic surveillance relating to the gathering of foreign intelligence information, which term we use to

include the gathering of information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage,"

It is, in fact, especially important that the exclusionary rule be fully enforced through the adversary system in national security cases. Doubts concerning the wisdom or effectiveness of exclusion in ordinary criminal cases are inapposite in the present context. See generally Bivens v. Six Unknown Named Agents, supra at 411 (dissenting opinion of Burger, C. J.), and the authorities collected in the appendix. We are not dealing here with a policeman's "blunder," or with other undeterrable law enforcement efforts. Compare People v. Defore, 242 N. Y. 13, 21, 23-24, 150 N: E. 585, 587-88 (1926) (Cardozo, J.). "Surreptitious electronic surveillance . . . is usually the product of calculated, official decision rather than the error of an individual agent of the state," Alderman v. United States, supra at 203 (opinion of Fortas, J.), and this Court's order requiring disclosure of all illegally seized evidence to aggrieved defendants will certainly cause a considered reappraisal of wiretapping practices in light of the interest in successfully prosecuting offenders. Furthermore, to require the courts to decide relevance in camera would force upon them a role especially threatening to their continued neutrality when the Government is claiming that disclosure will prejudice national security. Public hearings, on the other hand, are favored in our system of justice as "an effective restraint on possible abuse of judicial power." In re Oliver, 333 U. S. 257, 270 (1948). Rather than pose a threat to the public interest as the Government claims, they should enhance public awareness of how the government exercises powers that are highly threatening to political freedom. Any embarrassment that stems from a disclosure of the fruits of unjustifiable eavesdropping need not command the

sympathetic attention of this Court, See, e.g., United States v. Clay, supra (wiretap of Dr. Martin Luther King, Jr.). Drawing the line between what may threaten the nation and what may embarrass or threaten a particular administration is a task that no court should undertake.

## B. Congressional Policy Supports the Disclosure Rule of Alderman.

The Government argues that Congress has indicated its desire to overrule Alderman in the Omnibus Crime Control and Safe Streets Act of 1968, and in the Organized Crime Control Act of 1970. The 1970 Act is inapplicable, and the clear language of the 1968 Act fails to support the Government's claim. In fact, the 1968 Act, and other statutory provisions, indicates that Congress favors disclosure to determine relevancy, especially of a defendant's illegally seized statements.

Section 2518(10)(a) of the Omnibus Crime Control and Safe Streets Act of 1968 provides that an aggrieved person may move to suppress evidence obtained through an electronic interception that failed to comply with the Act's procedures and standards for such surveillance. section's effect is just the opposite of what the Government contends. It states that the judge, "upon the filing of such motion [to suppress] by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." (Emphasis added.) This sentence (when read in full, rather than as the Government quoted it, Gov't Brief, p. 41), clearly refers to how the judge should behave immediately after a motion to suppress is filed, and before its validity has been determined. The sentence authorizes some disclosure, even on the issue of legality, to the extent the judge feels

disclosure is in the interests of justice. The section-by-section analysis in the Senate Report, referred to by the Government, reinforces the clear meaning of the statutory language. It states that, "Upon the filing of such a motion to suppress, the court may make available to the person or his counsel such portions of the intercepted communications or evidence derived therefrom as the court determines to be in the interest of justice." S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968). (Emphasis added.) Then it states that access should be limited for various reasons, see Gov't Brief, p. 41 n.19, concluding that "the privacy of other people [should not] be unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications." S. Rep. No. 1097, supra. (Emphasis added.)

Section 2518(10)(a) also provides that, "If the motion [to suppress] is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter." This provision is clearly a reference back to section 2515, which provides that "no part of the contents of such [illegally obtained] communication and no evidence derived therefrom may be received in evidence in any trial ..." (Emphasis added.) This provision adopts the taint

rule enforced in *Alderman*, and in no way suggests that it should be applied in a less rigorous manner.

The Government's argument based on section 2518(8) (d) is even further off the mark. That section requires that an inventory be served on persons whose communications are intercepted, except that it allows the inventory to be postponed for "good cause." The section also states: "The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in

the interest of justice." This provision emphasizes the liberality of Congress in allowing disclosure. It says that an aggrieved person must be informed that his communications have been intercepted, and that he may be supplied with parts of the communications, even before he has been prosecuted, or has filed a motion to suppress, or has demonstrated the interception's illegality. This goes much further than Alderman, which requires disclosure, but only after the aggrieved person has proven, through a motion to suppress, that the search was illegal.

The Government's arguments under section 2518 are, of course, diversionary. The Attorney General claims to have acted in accordance with section 2511(3) which provides that the Act should not be deemed to affect the President's constitutional power to gather national security information. Section 2511(3) indicates, if anything, that the Government is wrong in its attack on Alderman. That section provides for the use at trials of evidence collected through "national security" eavesdropping only where the interception was "reasonable." Disclosure of the evidence. is not "otherwise" allowed, "except as it is necessary to implement" the President's power. This provision implicitly requires, rather than precludes, disclosure in a relevancy hearing. First, unless relevancy is fully tested, it is possible that intercepted evidence will be used at a trial, directly or indirectly, even though its seizure was unreasonable. The statute allows the use of such evidence only when reasonably seized. Second, when Congress passed the Crime Control Act it was already established that the arguable relevance of evidence illegally seized by wiretap has to be tested through the adversary system. Thus, in Nardone v. United States, supra, 308 U. S. at 339, the defendant appealed from the trial court's refusal to allow him "to examine the prosecution as to the uses to which it had put the [illegally seized] information . . . . " This Court unanimously reversed, holding that, once an accused had proved

"that wiretapping was unlawfully employed . . ., the trial judge must give opportunity, however closely defined, to the accused to prove that a substantial portion of the case against him was a fruit of a poisonous tree." Id. at 341. See Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392 (1920). In this context, it is "necessary to implement" the power to eavesdrop for national security purposes that disclosure be made when the Government seeks to prosecute someone upon whom it has eavesdropped illegally and who has standing to challenge that unlawful action.

The Government itself admits that section 3504(a)(2) of the Organized Crime Control Act of 1970 is inapplicable to this case. The statute applies only to unlawful searches occurring prior to June 19, 1968, and the Government concedes the search in this case occurred after June 1968. Gov't Brief, p. 42. In the legislative debates on this section there were several indications that some Congressmen believed that section 3504(a)(2) was intended to overrule Alderman as to all pre-June 1968 searches and that the Omnibus Crime Control and Safe Streets Act of 1968 had so provided for all post-June 1968 searches. Id. at 43-46. As shown above, however, these Congressmen were wrong about the purpose and language of the 1968 Act. There is, moreover, a perfectly reasonable explanation as to why Congress allowed Alderman to apply in all post-June, 1968 decisions, but in no pre-June 1968 decisions. It is that no system had been developed prior to the 1968 Act to enable the federal government to eavesdrop and use the evidence obtained. After the 1968 Act, however, a structure for eavesdropping was established, and the Government's failure to comply with it might reasonably have been viewed as more serious than illegality prior to the Act, thereby warranting full enforcement of the exclusionary rule. In any event, the 1970 Act is inapplicable to this case, and the intentions of some of its proponents cannot substitute for an adequately precise overruling of the procedures set up in the 1968 Act. Any doubt

on this score should be resolved against a construction that would raise grave constitutional questions.

It is appropriate to add that in 1966 Congress amended Rule 16 of the Federal Rules of Criminal Procedure to permit courts to order "the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government . . . . " This revised rule was intended to expand the scope of discovery, e.g., Walsh v. United States, 371 F. 2d 436 (1st Cir), cert. denied, 387 U. S. 947 (1967), to the point where it grants to the defendant an almost automatic, absolute right to discover his own written or recorded statements, United States v. Longarzo, 43 F. R. D. 395 (S. D. N. Y. 1967); United States v. Federman, 41 F. R. D. 339 (S. D. N. Y. 1967). See Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo. L. J. 1276, 1277 (1966). Recorded statements are within the rule. E.g., United States v. Nolan, 423 F. 2d 1031 (10th Cir.), cert. denied, 400 U. S. 848 (1970); United States v. Crisona, 416 F. 2d 107 (2d Cir. 1969), cert. denied, 397 U. S. 961 (1970). The only limit on discovery of such statements is Rule 16(e), see United States v. Isa, 413 F. 2d 244 (7th Cir. 1969), to which the Court referred in Alderman as the basis upon which protective orders could be obtained. "[T]he only defensible interpretation is that discovery under rule 16(a) of the kinds of materials there listed is to be a matter of right, subject only to the power of the court to issue protective orders in proper cases, which is explicitly spelled out under subsection (e) of the rule." Comments of Charles A. Wright, at the Twenty-Ninth Annual Judicial Conference of the Third Judicial Circuit, 42 F. R. D. 437, 567 (1966). Given this controlling congressional policy, and the strong considerations for an adversary proceeding, this Court should reaffirm its recent decision in Alderman.

#### CONCLUSION

The Government's position in this case stems from its resolve to engage in searches so broad in conception, so baseless in instigation, and so limitless in execution that every historic protection built into the Fourth Amendment must be ignored to allow them to occur. It is because the Government wants to search indiscriminately that it seeks exemption from the rules of particularity. It is because the Government wants to investigate when no crime has been committed or is threatened that it deems superfluous the requirement of probable cause. And it is because the the Government wants to act without supervision and without justifying its actions that it would denigrate the warrant requirement.

For countless generations, government officials have seized upon periods of stress to claim inordinate powers, intolerable in a free society. It is the mission of this Court to hold now, as it has in the past, that the processes of justice do not begin only when injustice has been done, but seek to prevent injustice from being done at all. This is the ancient and high purpose of the warrant, not to correct arbitrary intrusion of the government into the private affairs of its citizens, but to forestall it. This Court should reaffirm that purpose.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

WILLIAM T. GOSSETT
ABRAHAM D. SOFAER
Counsel for Respondents\*

<sup>\*</sup>At the request of Judge Damon J. Keith, counsel was designated by the State Bar of Michigan to represent Judge Keith in these proceedings. Other than to designate counsel, the State Bar is not involved in this matter and the arguments made and positions taken herein should not be ascribed to it.

### APPENDIX

### U. S. Constitution:

### AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### AMENDMENT V

No person shall be . . . compelled in any criminal case to be a witness against himself . . .

#### Statutes:

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 (82 STAT. 197, 18 U. S. C. 2510 et seq.):

§ 2511(3): Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack

### Appendix

or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceedings only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

§ 2515: Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

COMMUNICATIONS ACT OF 1934, 48 STAT. 1103, 47 U. S. C. A. § 605:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect,

### Appendix

or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or aftorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect," or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided. That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast; or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

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IN THE

## Supreme Court of the United States

October Term, 1971.

Supreme Court, U.S. FILED

No. 70-153.

DEC 15 1971

E. ROBERT SEAVER, CLERK

UNITED STATES OF AMERICA,

Petitioner,

8

UNITED STATES DISTRICT COURT FOR THE EAST-ERN DISTRICT OF MICHIGAN, SOUTHERN DIVI-SION and HONORABLE DAMON J. KEITH,

Respondents.

On Certiorari From the United States Court of Appeals for the Sixth Circuit.

BRIEF OF AMERICAN FRIENDS SERVICE COM-MITTEE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS' POSITION.

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Philadelphia, Pennsylvania,
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BARBARA MEYER ROTHENBERG, Of Counsel.

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### Supreme Court of the United States

OCTOBER TERM, 1971.

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Petitioner,

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION AND HONORABLE DAMON J. KEITH,

Respondents.

ON CERTIORARI FROM THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF AMERICAN FRIENDS SERVICE COMMITTEE AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS' POSITION.

### INTEREST OF AMICUS.

The American Friends Service Committee, Incorporated, established in 1917 and subsequently incorporated under the laws of the State of Delaware, engages in religious, charitable, social, philanthropic and relief work in the United States and in foreign countries on behalf of the several branches and divisions of the Religious Society of Friends (Quakers) in America.

Created as a working expression of the Quaker testimony against war and for universal justice and human brotherhood, the American Friends Service Committee has sought not only to relieve suffering but to move affirmatively against the underlying causes of violence, injustice and prejudice.

The promotion of equal employment opportunities for racial minorities has for many years been a major program direction of the amicus. One such program was in operation 10 years ago in Baton Rouge, Louisiana.

In February of 1961 the director of that program, Wade Mackie, received reports that his office telephone was being tapped. The F. B. I. and Southern Bell Telephone Company joined in an investigation, which revealed that Mackie's office and home telephones were both being tapped. The home tap went into the garage of Jack N. Rogers, then head of the Louisiana Un-American Activity Committee.

Following that investigation a Federal Grand Jury in New Orleans began hearings directed to discovering the source and purpose of the wiretapping. The Grand Jury heard testimony that the primary use of the tapped calls was to tape them and then to play them back before audiences of church laymen in an effort to force the ouster from their pulpits of 53 Baton Rouge ministers who had earlier signed an "Affirmation of Religious Principles." The "Affirmation" declared that "discrimination on the basis of race is a violation of the Divine Law of Love."

At least fifteen religious leaders were said to have been victims of the wiretapping. Three of them, Wade Mackie, Rabbi Marvin Reznikov, and Reverend Irvin Cheney testified before the Grand Jury.

After discovery that his conversations were being wiretapped, Reverend Cheney, pastor of the Broadmoor Baptist Church, resigned from his pastorate "for the good of the church and for my family". He refused any further communication with Mackie, and withdrew his support from the American Friends Service Committee program.

After the Jury recessed, a Baton Rouge Minister declared anonymously in an interview in the State Times:

"These telephone conversations were not tapped to get information on any subversive or integrationist activities . . . (they) were recorded to use as a wedge against the signers of the 'Affirmation', to take these recordings to key members of our congregations and stir up trouble against us. The two chief targets were Mackie and Reznikov because the admitted strategy was to link us with a man who works with Negroes and with a Jew, in order to stir up all the latent hatred of anti-semitism [sic] which you can find in small minority in any church congregations."

Besides outlining what he knew about the tapping and recording of telephone calls, the clergyman described obscene phone calls and mail, threats to his life, withdrawal of financial support for his church, and actions against church members who stood by him.

Speaking for the Louisiana Un-American Activity Committee, Jack N. Rogers said of the Committee's investigations:

"Every subversive organization in the southern United States uses one side or the other of the racial issue as a protective coloring for its activities. . . . The Committee investigates subversive activities, nothing more."

Amicus is deeply concerned about electronic surveillance by government of individuals and associations not only for the broader reasons hereinafter set forth, but also because of its experience in Baton Rouge. That experience taught two lessons. First, the power of wiretapping to damage or destroy programs for human betterment undertaken in utmost good faith and under religious conviction is enormous. Second, government's most facile justification for such surveillance is to talk about the dangers of subversion. For amicus there is something frighteningly familiar about the Affidavit of Attorney General Mitchell in this case that wiretaps are necessary to "protect the nation from attempts of domestic organizations to attack and subvert the existing structure of government." United States v. United States District Court, No. 71-1105 (6th Cir. April 8, 1971) at p. 12.

## THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The First Amendment to the Constitution of the United States:

Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

The Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### 18 United States Code § 2511(3):

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the over-

throw of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

### ARGUMENT.

### Introduction.

The government argues that in cases involving national security, Section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 reserves the power to the President or to the Attorney General as his delegate to authorize electronic eavesdropping without prior judicial determination of probable cause and particularity. If this national security eavesdropping is reasonable, then its fruits may be used in any ensuing "trial, hearing, or other proceeding". The term reasonable is ambiguous. Must the President's or his delegate's initial fear of a threat to the national security be reasonable, or must the use of the eavesdropping be reasonable, or both? The section, moreover, does not indicate whether reasonableness is a question of law or fact.

The danger inherent in such a broad interpretation of the power as the government requests, exempt from the Fourth Amendment's requirement of prior judicial determination, is that the government may use this power to silence persons or groups feared only because they advocate unpopular ideas.<sup>1</sup>

This Court has explicitly recognized that freedom of association is guaranteed by the First Amendment.

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this court has . . . recognized by remarking upon the close nexus between freedom of speech and assembly . . . Of course, it is immaterial whether the beliefs sought

<sup>1.</sup> This argument is largely indebted for structure and content to Note, "Eavesdropping at the Government's Discretion—First Amendment Implications of the National Security Eavesdropping Power", 56 Cornell L. Rev. 161 (Nov. 1970).

to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. NAACP v. Alabama ex rel. Patterson, 357 U. S. 449, 460-61 (1958).

Electronic eavesdropping of associations without the prior judicial review guaranteed by the Fourth Amendment abrogates the privacy which this Court has said is essential to freedom of association. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." NAACP v. Alabama ex rel. Patterson, supra, at 462. If Section 2511(3) is upheld, as the government reads it, then freedom of association will be impaired in contravention of the First Amendment.

<sup>2.</sup> This Court has recognized that the unrestricted use of investigation and police power has a destructive effect upon the exercise of fundamental freedoms. Cramp v. Board of Pub. Instr., 368 U. S. 278, 283 (1961); Sweezy v. New Hampshire, 354 U. S. 234, 250-51 (1957). This Court has also found infringement of the First Amendment right of association in various forms of state and federal action. United States v. Robel, 389 U. S. 258 (1967) (denial to Communist Party member of employment at defense facility); Keyishian v. Board of Regents, 385 U. S. 589 (1967) (requirement of loyalty oath for teachers); Elibrandt v. Russel, 384 U. S. 11 (1966) (public employee loyalty oath requirements); Aptheker v. Secretary of State, 378 U. S. 500 (1964) (travel restrictions on Communist Party members); Baggett v. Bullitt, 377 U. S. 360 (1964) (teacher oath); NAACP v. Alabama ex rel. Flowers, 377 U. S. 288 (1964) (ouster of organization from the states); Brotherhood of R. R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U. S. 1 (1964) (proscription of cooperative legal activities); NAACP v. Button, 371 U. S. 415 (1963) (same); Louisiana ex rel. Gremillion v. NAACP, 366 U. S. 293 (1961) (forced disclosure of membership lists); Shelton v. Tucker, 364 U. S. 479 (1960) (teacher oath); Bates v. Little Rock, 361 U. S. 516 (1960) (forced disclosure of membership lists); NAACP v. Alabama ex rel. Patterson, 357 U. S. 449 (1958) (same).

The Court of Appeals' holding in the present case demonstrates that Section 2511(3) is subject to attack on Fourth Amendment grounds alone. A Fourth Amendment attack, however, is not necessarily available to all members of an association. This Court has held that Fourth Amendment rights are personal and may not be vicariously asserted. Therefore, one affected by an eavesdrop cannot assert a Fourth Amendment violation if he was not directly subjected to eavesdropping. Alderman v. United States, 384 U. S. 165, 174 (1969). It is for this reason and in light of its particular interest in this case that the amicus presents a First Amendment attack on Section 2511(3).

### I. The Government's Potential Eavesdropping Power Under Section 2511(3) Will Have a Deterrent Effect on Freedom of Association.

When the police power of government is exercised pursuant to vague or overbroad legislation, so that citizens are in doubt as to what activity is unlawful or otherwise subject to unfavorable official action, those citizens may be deterred from pursuing legal or even constitutionally protected activities. When a vague or overbroad statute deters the exercise of First Amendment rights, it is said to have a "chilling effect" on those rights. Dombrowski v. Pfister, 380 U. S. 479, 483-90 (1965).

More than thirty years ago this Court observed that the evils to be prevented by the First Amendment "were not the censorship of press merely, but any action of the government by means of which it might prevent . . . free and general discussion of public matters . . . "Grosjean v. American Press Co., 297 U. S. 233, 249-250 (1936). The philosophical objection to electronic eavesdropping in the name of the "national security" is that it has the hallmarks

of a police state with the government maintaining a record of the political ideas and activities of the populace. The constitutional objection is that it puts a burden on the exercise of First Amendment rights which at least arguably has an "inhibiting effect in [sic] the flow of democratic expression and controversy upon those directly affected and those touched more subtly." Sweezy v. New Hampshire, 354 U.S. 234, 248 (1967). Recognition of this inhibition is not limited to eases in which court sanctions are imposed. "Inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." Lamont v. Postmaster General, 381 U.S. 301, 309 (1965) (Brennan J., concurring). People who are merely identified with views that are "unorthodox, unpopular, or even hateful to the general public" suffer injury recognizable under the First Amendment. Watkins v. United States, 354 U.S. 178, 197 (1957).

Thus freedom of association is particularly vulnerable to chilling. Unless government power to eavesdrop in Section 2511(3) national security cases is restrained by narrowly drawn legislation which implements Fourth Amendment safeguards, the slightest unfavorable attention from the government toward an unpopular group will arouse in its membership a fear of eavesdropping. Eavesdropping under Section 2511(3) occurs without notice. Hence, the chill does not result from the eavesdropping itself, but from the fear that it will occur. This fear that the privacy of association will be destroyed may activate the harmful effects of chilling.

Formerly, when confronted by an exercise of police power which conflicted with freedom of association, the Supreme Court resolved the conflict by "balancing" the respective interests. E.g., NAACP v. Alabama ex rel. Patterson, 357 U. S. 449, 461 (1958); American Communications Association v. Douds, 339 U. S. 382, 393-404 (1950);

Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 88-105 (1961). If a statute was vague or overbroad, the court "rewrote" it in order to conform to the First Amendment. American Communications Association v. Douds, 339 U.S. 382, 393 (1950). In United States v. Robel, 389 U. S. 258, 264-68 (1957), however, the Court indicated that when a statute is not drawn with sufficient precision to avoid imposing a "substantial burden" on freedom of association, balancing legitimate national security interests against First Amendment rights is inappropriate. Robel involved a federal statute that prohibited employees in designated defense plants from continuing to work once they had knowledge that an organization of which they were members had been designated as a "communist action" organization by the Subversive Activities Control Board. In holding the statute unconstitutional, the Court did not deny that protecting against sabotage in defense facilities was a proper government purpose; nor was the Court concerned with whether Congress could reasonably have found that Communists might use their positions to engage in sabotage. The Court was "concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. task of writing legislation which will stay within those bounds has been committed to Congress." Id. at 267. To the suggestion that the proper judicial technique was to balance the legitimate governmental interest against the threatened First Amendment rights, Chief Justice Warren responded:

This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more cir-

cumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination, we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way "balanced" those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict. Id. at 268 n. 20.

Although on first glance there is a wide difference between the legislation involved in Robel and the investigative activities in Section 2511(3), on a closer look the difference is superficial. The legal objection to the Robel legislation was that it placed a substantial burden on the First Amendment protected activity of associating with a "communist action" organization. Membership in a "communist action" organization was not criminal, but anyone who so exercised his constitutional right was precluded from holding certain jobs. Viewed in this way the Robel legislation is similar to Section 2511(3), which imposes upon the constitutionally protected activity of association, the substantial burden that the government may monitor the member's unpopular activities for use as it sees fit. Moreover, this Court has recognized that governmental maintenance of records concerning advocates of unpopular ideas does have a deterrent impact on exercise of First

Amendment rights, and that governmental conduct which deters persons from exercising their rights does constitute an abridgement of those rights. Lamont v. Postmaster General, 381 U. S. 301, 307 (1964).

In view of this Court's declaration in Robel that it will not balance governmental interests against constitutional prohibitions, government may act only upon non-protected activities and is forbidden to employ prophylactic methods that control and regulate protected activity in order to promote otherwise legitimate purposes. Thus, if proposed governmental activity threatens to jeopardize associational rights, Congress must find narrower means to accomplish its goal.

Judicially unsupervised eavesdropping clearly has the potential to deter the protected right of association by placing persons in fear that this privacy will be invaded. It must therefore be more narrowly confined by a statute with built-in Fourth Amendment protection. The test is whether the statute or regulation is sufficiently clear on its face so that lawmaking power is not delegated by default to the investigator. See Gregory v. Chicago, 394 U.S. 111, 120 (1968) (Black, J., concurring). The investigator must be limited to electronic seizure of evidence of specific criminal conduct and denied the discretion to monitor unpopular groups randomly or in disregard of the First Amendment rights of those members pursuing lawful conduct.

II. Eavesdropping as Permitted by Section 2511(3) Is Not Sufficiently Circumscribed to Avoid Conflict With the First Amendment Right of Association.

Under Section 2511(3) the preliminary decision of the President or his delegate to initiate eavesdropping is exempt from the Fourth Amendment's mandate of judicial approval. Associations must therefore depend for protection

of their First Amendment rights on the self-imposed restraint of the eavesdropper or upon ultimate review by a trial court. At trial the courts must implement the section's vaguely defined standard of reasonableness. But trial will most often come too late to prevent the irreparable chilling This Court has rejected the sugeffect on association. gestion that the proper forum for vindication of rights is. necessarily a criminal prosecution on the merits under the offending statute, on the ground that, if such were the case only the hardiest would dare exercise their rights. Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965). The statute neither authorizes nor forbids the blanket use of eavesdropping against associations thought to threaten national security. Moreover, the definition of acts dangerous to the national security is left substantially to executive discretion. The statute lacks standards to guide the investigator's conduct toward associations. Such lack of standards has been a determinative factor in many First Amendment cases involving association. See United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring); Dombrowski v. Pfister, 380 U. S. 479, 494 (1965); Baggett v. Bullitt, 377 U. S. 360, 366 (1964). Hence, Section 2511(3) is offensive to the First Amendment because it is overbroad; it allows too great an intrusion on freedom of association. United States v. Robel, 389 U. S. 258, 259-61, 265 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 602-10 (1957); Elfbrandt v. Russel, 384 U.S. 11, 12-19 (1966); Aptheker v. Secretary of State, 378 U. S. 500, 508 (1964); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 296-97 (1961); Shelton v. Tucker, 364 U.S. 479, 488-90 (1960).

Only invalidation of the section can insure freedom of association the protection guaranteed by the First Amendment. It is not certain that the exclusionary rule would be available in a case not arising under the Fourth Amendment. Moreover, the exclusion would not neutralize any "chilling effect" that had already occurred, because it is available only to those directly subject to the violation.

Alderman v. United States, 394 U. S. 165, 171-72 (1969).

## III. Freedom of Association Is Essential to the Formulation of Public Policy in a Democracy.

Public policy in a democracy is made by permitting and indeed encouraging the free play and clash of a variety of notions about what that policy should be. In this process organizations and associations of every conceivable type have an indispensable part. Increasingly, we hear the voices of people who have associated themselves in groups to advance a point of view by raising the funds necessary to spread that point of view through the media. A democracy can only impoverish and eventually destroy itself by treating an environment of fear and mistrust which stills these voices. As Justice Holmes said in dissent in Abrams v. United States, 250 U. S. 616 (1919) at page 630:

".... when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with

the lawful and pressing purposes of the law that an immediate check is required to save the country."

We are met with the argument that no dire effect upon "free trade in ideas" may reasonably be anticipated from electronic surveillance limited to cases of "attempts of domestic organizations to attack and subvert the existing structure of government.")

As it reviews the positions it has taken on a number of public policy questions over the years, amicus is not comforted by these words. Would it have been plainly unreasonable, for example (assuming some test of the reasonableness to have been afforded) to have conducted an investigation by wiretapping of an equal employment opportunities program in Baton Rouge in 1961? Would it have been clearly impermissible, under the Attorney General's criteria, to. wiretap an organization which first advocated total and unilateral withdrawal of American troops from Vietnam in 1954? What about an organization which in 1965 announced its support of the admission of Red China into the United Nations? Or an organization which in 1970 published a comprehensive, and highly controversial, series of proposals to bring about lasting peace in the Middle East? Where do we find that clear line between the subversive and the unpopular which would, for example, have shielded anicus when, long before Attica, it was promoting prison reform, or when, well ahead of government espousal or popular acceptance, it spoke out in favor of legal aid to the poor and guaranteed minimum incomes?

Amicus makes no claims of significant impact on public policy in the United States. But if what it has tried to do is multiplied by the number of domestic organizations which have made similar efforts the significance is undeniable, as is the significance of inhibiting those organizations by introducing a climate in which they must watch their words, lest government listen in.

### CONCLUSION.

Section 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 invades the fundamental freedom of association which is guaranteed by the First Amendment of the Constitution because it is vague and overbroad. For the reasons outlined, this section of the law should be declared unconstitutional.

Respectfully submitted,

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E RUBERT SEAVER, CLERK

IN THE

## Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA. Petitioner,

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

and HONORABLE DAMON J. KEITH, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

> International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). By: Stephen I. Schlossberg M. Jay Whitman 8000 East Jefferson Avenue

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# Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA,
Petitioner,

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

and
HONORABLE DAMON J. KEITH,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The filing of this brief as amicus curiae has been consented to by all the parties under Rule 42(2) of the Supreme Court Rules.

#### INTEREST OF AMICUS

The UAW is an industrial union which, as of November 1971, represents more than 1,350,000 workers in the automobile, agricultural implement, aerospace, and other industries in North America. Of this number nearly 1,234,000 members and their families are citizens of the United States and as such are vitally interested in the preservation of their constitutional liberties.

The UAW has a long tradition of defending the civil liberties of not only our members but all Americans. We realize that the union is the first victim of authoritarianism, and that geniune unionism can flourish only in a democratic atmosphere where the rights of the individual are given the high priority they deserve. Our past actions and our convention resolutions attest this commitment.

But besides this devotion to civil liberties, the UAW has a particular interest in the issues presented by the instant case. The UAW and its members know from bitter experi-

<sup>1</sup> As the late Walter Reuther put it in "UAW: Past, Present and Future," 50 U. Va. L. Rev. 58, 98 (1964):

<sup>&</sup>quot;The UAW attempts to defend the civil liberties of our members and all Americans. Our financial support of civil liberties' organizations and our convention resolution make this abundantly clear. For instance, we were among the first to raise our voices against McCarthyism, against which the racist formula of the McCarran-Walter immigration law, and against the second class citizenship forced upon the Negro in America. As participants in the labor movement, we realize that the free trade union is the first victim of any dictatorship and that genuine unionism can flourish only in a democratic atmosphere where the rights of the individual are given top priority."

ence what it is to be spied upon. In the not-too-distant past, political and economic opponents were labeling the UAW "subversive," "dangerous," and a "threat to national security;" then using these labels as an excuse to ride roughshod over our precious civil liberties. Because of this experience the UAW is uniquely well aware of the serious threat to our civil liberties posed by the government's position in this case. Present officers of the UAW have lived through surveillance and other denials of basic rights. They know full well that the activities of the Justice Department in this case have a chilling effect on the First Amendment

See also: Federal Bearings Co., 4 NLRB 467, 471 (1937); Highway Trailer Co., 3 NLRB 591, 607, (1937), enf'd per curiam, 95 F. 2d 1012 (CA 7, 1938); and Reuther, op. cit., 50 U. Va. L. Rev. 58, 59-63; and generally, U.S. Senate, Committee on Education and Labor, INDUSTRIAL ESPIONAGE, Report No. 46, 75th Congress, 2d Session, 1987.

<sup>&</sup>lt;sup>2</sup> Jerold S. Auerbach, LABOR AND LIBERTY: THE LAFOL-LETTE COMMITTEE AND THE NEW DEAL (Bobbs Merrill ed, 1966) at 99:

<sup>&</sup>quot;The history of organization efforts by automobile workers in Flint, Michigan, presented a paradigm of the destructiveness of industrial espionage. In 1934 the Federal Union of Automobile Workers boasted 26,000 members in General Motors plants in that city. But of thirteen members of the union's executive board at least three were spies; one served as chairman of the organizing committee, and another represented the local at a convention where plans for new organizing drives were formulated. Within two years membership in the Flint local fell to 120. When UAW organizers came to Flint they found workers who were afraid to participate in overt union activities. Clandestine meetings were held at night with the lights out, for the frightened men were unwilling to risk being identified. The LaFollette Committee concluded that through espionage private corporations dominate their employees, deny them their constitutional rights, promote disorder and disharmony, and even set at naught the powers of the Government itself." (emphasis added).

<sup>\*</sup>Employers and detective agency officials advanced several justifications for espionage: protection against radicalism, prevention of sabotage, detection of theft." Auerbach, op. cit., at 99.

rights of the members of the UAW. We submit that we are in a position to help this Court more realistically to evaluate the true dangers of the government's position. And we fear that, unless those dangers are fully appreciated, the UAW and Americans generally may yet be forced to repeat some of the saddest chapters in this nation's history.

For these reasons, the International Union, UAW files this brief as amicus curtae in support of respondents.

#### QUESTIONS PRESENTED

- 1. Is the Fourth Amendment violated by electronic surveillance specifically authorized by the President, acting through the Attorney General, to gather intelligence information which the Executive branch deems necessary to protect against attempts to overthrow the government by force or other unlawful means, or against other clear and present dangers to the government's structure or existence!
- 2. If such national security surveillance is unlawful, would it nevertheless be appropriate for a federal district court in a criminal prosecution to determine in camera whether the interceptions are arguably relevant to the prosecution before requiring their disclosure to defendant!

So We submit that the UAW is not alone in its apprehension. The AFL-CIO recently expressed a similar view in its resolution abhoring the unrestricted use of the wiretap.

### SUMMARY OF ARGUMENT

Stripped to its basics the government is claiming that in the area characterized as "threats to national security" the Executive may, while exempt from any meaningful safeguards, tap or electronically bug whomever they see fit. Electronic surveillance is dragnet in character, and its uncontrolled use poses a clear threat to constitutional rights. Nevertheless, the government seeks exemption from any meaningful safeguards.

They would avoid normal Fourth Amendment safeguards by arguing that "national security" surveillances are really administrative searches, subject only to a balancing test for reasonableness, and that these searches fit within the foreign intelligence exception to the Fourth Amendment. But reliance on the balancing test of the administrative search area is misplaced. Here we are dealing with Constitutional rights, not administrative regulation. Moreover, the Fourth Amendment safeguards are particulary important in this case. The history of the Fourth Amendment clearly shows that it was designed to protect a citizen's right of free speech from government suspicions of subversion and disloyalty. To argue as Petitioner does here, that because subversion may be involved this case is exempt from Fourth Amendment protections, is to turn the purpose of the Fourth Amendment on its head. Thus, this surveillance must be presumed arbitrary and unreasonable. Because basic liberties are involved, the government bears a heavy burden to show the surveillances both well justified and thoroughly safeguarded.

Nor may the government bootstrap itself into the foreign intelligence exception with unsubstantiated insinuations.

The government insinuates that domestic radicals are so "interrelated" with foreign intelligence operations as to deserve identical treatment. Again the government seeks to judge its own case. They offer neither clear evidence nor independent judgment of such involvement. Further, even if they could show such "interrelation", this case does not fall within the foreign intelligence exception. Here the Executive seeks in peacetime to uniforterally decide that domestic organizations of United States civilians are exempt from the protections of the Fourth Amendment. Nor does past practice under the Olmstead line of cases establish the constitutional permissibility of these surveillances now that Kats has overruled Olmstead.

No other meaningful safeguards have been suggested by Petitioner. Approval by the Attorney General offers no protection because he is an interested party. The possible answerability of the Attorney General, through the President, to the People is no protection because the People will have no information, about these surveillances; and because the Fourth Amendment was conceived precisely as a safeguard against answerability to the People on matters of basic liberties. After-the-fact judicial review for arbitrariness is no protection because the standard is weak and the government controls the information.

In the absence of meaningful safeguards, the danger of abuse is intolerable. If one category exists practically and legally immune from scrutiny or control, no other area can be safe. It will be easy to fit troublesome opponents within the privileged area, especially if it is as inherently vague as "threat to national security."

The technological sophistication of modern eavesdropping itself raises doubts about the ability of even the Attorney General, who is trained as a lawyer, to detect or control

abuse of surveillance. Recent history gives little reason for optimism. As the Martin Luther King case shows, the F.B.I. has wilfully disregarded the requirement of prior Attorney General approval. The King experience also shows that the Attorney General has no trouble eavesdropping on any prominent American, whatever his political persuasion, in the interests of "national security." Even the government's own brief is ample evidence of the danger of abuse, absent Fourth Amendment safeguards. The government shows an inability to fully appreciate the difference between what is the case and what ought to be the case. To lack this ability is to lack the conceptual apparatus needed to recognize when an existing policy is unconstitutional, thus the ability to spot abuses. Again, consider the government's attempt to rely on past practice since Olmstead has been overruled, this practice only amounts to a construction of \$605 of the Communications Act. Thus, the government is trying to create a constitutional exception from a statutory construction. Further expansion should be simplicity itself.

The only hope of preventing and controlling abuse is to adhere to Fourth Amendment safeguards. Although control may be difficult, the Constitution requires that we try. Adherence to safeguards does not deny the authority of the Attorney General to defend society, it merely controls the methods he uses. The government cannot argue that the judiciary is incapable of prior review of surveillances. It is presumptuous and contrary to the whole thrust of the Fourth Amendment to tell judicial offices they lack the ability to handle complicated cases. Nor can the government argue that in camera proceedings are an adequate substitute for disclosure under Alderman. The very considerations which Mr. Justice White stressed as requiring disclosure are present here, as the government's brief shows. Alderman is not an exercise of supervisory powers.

The Palmer Raid period provides a clear example of history the government would doom us to repeat. Some years before the raids of 1919-20 this Court gave the government an area within which "administrative procedures" would be totally exempt from the safeguards of the Bill of Rights; deportations of resident aliens. There were standards to prevent abuse, but those standards were applied by the Executive. There was after-the-fact judicial review for abitrariness. The national security was purportedly. being protected against the I.W.W., a domestic dissident organization. As the I.W.W. was thought to be "interrelated" with foreign enemies, it became fair game for unrestricted espionage. Warrantless, dragnet searches, mass arrests and incommunicado interrogation became the order of the day. Finally, under pressure from men like Felix Frankfurter, the President brought his subordinates (including J. Edgar Hoover, head of the Justice Department's General Intelligence Division) to heel.

#### INTRODUCTION

This brief will focus on the potential for abuse inherent in the government's position. Our purpose is not to discuss every aspect of the questions presented in exhaustive detail. Rather, it is to help this Court more fully to appreciate the grave threat to our basic liberties raised by the government's claims.

#### ARGUMENT

I.

THE GOVERNMENT IS CLAIMING AN AREA WITHIN WHICH THE EXECUTIVE MAY, WITHOUT ANY MEANINGFUL SAFEGUARDS, EAVESDROP ELECTRONICALLY ON WHOMEVER THEY SEE FIT.

Stripped to its basics the government is claiming that in the area vaguely characterized as "threats to national security" the Executive may, while exempt from any meaningful safeguards, tap or electronically bug whomever they see fit. In effect, what is being claimed is an area within which the government will be totally privileged, practically and legally immune from any effective scrutiny or control.

### A. Unrestricted Electronic Surveillance Poses a Clear Threat to Constitutional Rights.

The serious threat which indiscriminate eavesdropping, whether by tap or electronic bug, poses to basic constitutional liberties has been frequently stressed. As Mr. Justice Douglas has put it:

"Wire tapping, wherever used, has a black record. The invasion of privacy is ominous. It is dragnet in character, recording everything that is said, by the innocent as well as by the guilty. It ransacks

<sup>&</sup>lt;sup>4</sup> Wm. O. Douglas, AN ALMANAC OF LIBERTY (Doubleday ed., 1954), at 355. See also: H. Schwartz, "The Legitimization of Electronic Eavesdropping: The Politics of 'Law and Order,'" 67 Mich. L. Rev. 455 (1969); Mr. Justice Brandeis, dissenting in Olmstead vs U.S., 277 U.S. 438, 478 (1928); "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping".

their private lives, overhears their confessions, and probes their innermost secrets. It is specially severe in labor espionage, in loyalty investigations, in probes to find out what people think."

In Berger v. New York, 388 U.S. 41, 55-56 (1967), this Court wrote:

"By its very nature eavesdropping involves an intrusion on privacy which is broad in scope. As was said in Osborn v. United States, 385 U.S. 323 (1966), the 'indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth . . . Amendment . . . and imposes a heavier responsibility on this court in its supervision of the fairness of procedures . . . 'at 329, n. 7."

It is, we submit, safe to assume that in the four years since Mr. Justice Clark wrote these words electronic eavsedropping has become even more sophisticated, even more "dragnet in character," even more of a threat to constitutional rights. Thus, the law enforcement agencies who use eavesdropping, and the courts who supervise its use bear an even heavier responsibility to show that such activities are both well justified and thoroughly safeguarded against abuse.

- B. The Government Claims an Exemption from any Meaningful Safeguards.
- 1. THE GOVERMENT SEEKS TO AVOID NORMAL FOURTH AMENMENT SAFEGUARDS.

There are two safeguards normally used to protect fourth amendment rights: prior judicial approval, and disclosure under Alderman v. United States, 394 U.S. 165 (1969). The government seeks to avoid these safeguards by the related arguments: (1) that "national security" surveillances are

really administrative searches, subject only to a balancing test if they are neither arbitrary nor capricious; and (2) that surveillance of individuals who, like defendant Plamondon, are thought dangerous to the national security fits within the foreign intelligence exception to the Fourth Amendment.

## a. But Reliance on the Balancing Test of the Administrative Search Area is Misplaced.

This Court need not be reminded that the government of the United States is one of limited powers. The Bill of Rights was designed precisely to ensure that the federal government's powers over the people remained limited. The warrant requirement of the Fourth Amendment was designed to provide a judicial safeguard against the abrogation of power by the Executive branch. Boyd v. United States, 116 U.S. 616 (1885).

The wisdom of this approach is clear. "If men were angels," it was said long ago in the Federalist, "no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

<sup>&</sup>lt;sup>5</sup> Brief of the United States, p. 6.

<sup>8</sup> Brief of the United States, p. . 7.

Federalist, No. 51 (Madison).

The "auxiliary precaution" at issue here is no mere rule of convenience. Here we are dealing with the Fourth Amendment. Convenience and inconvenience, efficiency and inefficiency are not to the point. As Mr. Justice Douglas put it:

"Wire tapping, it is said, is essential or important in detection of crime. The use of torture is also effective in getting confessions from suspects. But a civilized society does not sanction it. Wire tapping may catch criminals who might otherwise escape. But a degree of inefficiency is a price we necessarily pay for a civilized, decent society. The free state offers what a police state denies—the privacy of the home, the dignity and peace of mind of the individual. That precious right to be let alone is violated once the police enter our conversations." (emphasis supplied).

These sentiments were reaffirmed in Coolidge v. New Hampshire, 403 U.S. 443 (1971). In language particularly relevant to the instant case, this Court said, 403 U.S. 443, 455:

"In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution of this continent—a right of personal security against arbitrary intrusions by official power. If times have

<sup>&</sup>lt;sup>8</sup> Wm. O. Douglas, op. cit., at 354. "We in this country, however, early made the choice—that the dignity and privacy of the individual were worth more to society than an all powerful police." Douglas, J., dissenting in *United States v. Carignan*, 342 U.S. 36, 46 (1951).

changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less important." (emphasis added).

If a government of limited powers and our Fourth Amendment safeguards mean anything, they mean that the government bears the burden of thoroughly justifying any intrusion on the citizen's privacy, and of establishing the existence of sound safeguards against abuse. To begin their discussion, as the government does, from the assumption that. our basic freedoms are to be weighed, as so much hamburger, against the efficiencies of hunting subversives, is to fly in the teeth of both history and the pronouncements of this Court. The history of the Fourth Amendment shows that it was designed to protect individual rights against arbitrary intrusions of official power, particularly when those intrusions are made in the name of preventing subversion and disloyalty. The issue is not whether they may spy upon suspect citizens until someone shows the spying to be, on balance, unreasonable. Rather, the point is that spying on any citizen, suspect or not, is unreasonable the guernment can establish the Constitutional presumption against searches and seiz-

The constitutional presumption against searches and seizures is particularly strong when First Amendment rights are endangered, as they are here, Stanford v. Texas, 379 U.S. 476 (1965), per Stewart, J. Plamondon and his associates are, to say the least, politically opposed to the current Administration. Of course, a defendant's political

<sup>9</sup> Brief of the United States, pp. 5-6.

in The government admits as much. Atterney General Mitchell's affidavit states that the surveillance in question here was "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government." (Brief of the United States, p. 3).

beliefs are irrelevant in a criminal trial. But the issue here is the legality of the tactics used against a criminal defendant. The fact that defendant Plamondon is also a political opponent of the current Administration should bring to mind Judge Learned Hand's warning, United States v. Kirschenblatt, 16 F. 2d 202, 203 (CA 2, 1926):

"Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition."

Whether or not the criminal case against defendant Plamondon was brought in order to suppress political opposition, the mere danger can only reinforce the constitutional presumption against surveillance. For, as Mr. Justice Brennan's exhaustive historical discussion in Marcus v. Search Warrant, 367 U.S. 717, 724-29 (1961) shows, the limits which the Fourth Amendment places on the discretion of officers is to the defense of freedom of expression and association, 367 U.S. at 729:

"The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression inhered in the discretion confided in the officers authorized to exercise the power." (emphasis supplied).

If dissenters know that officers have the unrestricted discretion to eavesdrop whenever they care to, then fear alone will stiffle free expression. Widespread surveillance never really need be undertaken. A few episodes will get the message across a very effectively chilling dissent.11

Against this background, it becomes clear that the eavesdropping in question here cannot even begin to be classified as an administrative search. This Court has restricted warrantless administrative searches to situations where the factual setting makes it obvious that adequate safeguards are present to prevent significant intrusions upon the interests protected by the Fourth Amendment. Generally, such searches are a necessary part of some regulatory scheme having little or nothing to do with the prevention of criminal activities.

Thus, in Wyman v. James, 27 L.ed.2d 408 (1971), Mr. Justice Blackmun was careful to point out that (a) Ms. James consented to the search, (b) that she was not compelled to consent to the search, (c) that home visits were necessary to the proper administration of the A.F.D.C. program, and (d) that the "home visit is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding" 27 Led 2d at 417. The search and seizure in question here is not remotely similar. As defendant Plamondon was unaware of the surveillance, he had no way to refuse consent. Indeed, the whole notion of consent is meaningless in the surveillance context. While Ms. James could protect her privacy, Plamondon could not. While this surveillance

national security surveillances are actually undertaken (Brief of the United States, p. 27, n. 10) misses the point. In the First Amendment area, even a few are too many. Moreover, it should be noted that the government only gives us information on telephone surveillances. It is altogether possible that the reason the number of telephone surveillances is declining is that such surveillances have become technologically outmoded in the last ten years. For aught we know the total number of electronic surveillances may have increased dramatically.

may not have been originally directed at Plamondon, it certainly "equates" with a criminal investigation. On the government's own showing, this surveillance was needed to prevent bombings and other "covert", terrorist tactics to destroy and subvert the government.12 Bombing, the use of terrorist tactics, conspiracy to do either, being an unregistered agent of a foreign power—these are all criminal under the laws of the United States or the several states. It must then follow that this surveillance was part of a criminal investigation. However, if this surveillance was not a necessary part of an effort to investigate and prevent these crimes, the government ought to favor this Court with an explanation of why such warrantless eavesdropping is so essential to protecting our national security. Either these surveillances are part of criminal investigations or they are not. If they are, then perhaps they are important to national security; but they are certainly not administrative searches.

In either event, the government seeks to use this particular surveillance "in aid of" a criminal proceeding. The protestation that "the Attorney General is gathering intelligence information for the President," rather than "obtaining evidence for use in a criminal prosecution," has a doubly hollow ring. First, as we have shown, the information in which the President is interested is information of criminal activities for which there will presumably be subsequent criminal prosecution." Second, even if this

<sup>13</sup> Brief of the United States, pp. 18-19.

<sup>13</sup> Brief of the United States, p. 19.

<sup>14</sup> This vitiates the government's attempt to distinguish Coolidge v. New Hampshire, on the ground that the warrant there was issued to obtain information for a subsequent criminal prosecution, Brief of the United States, p. 19, n. 8. Here, the purpose of the surveillance was also to obtain information for subsequent criminal prosecution. Of course, it is logically possible that the government intended to stop feared conspiracies, hombings and "terrorist tacties" by some other means than criminal prosecution and trial by jury. By what other means, we leave to the Court's imagination.

information were gathered for some "neutral" administrative reason, the government now seeks to use the information in a criminal proceeding.

In Camara v. Municipal Court, 387 U.S. 523 (1957), the administrative search case on which the government so strongly relies, 15 this Court, per Mr. Justice White, was equally careful to point out that the building inspection in question involved, 387 U.S. at 534:

"... significant intrusions upon the interests protected by the Fourth Amendment ... [and] that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual."

Consequently, this Court held that prior judicial approval of the search was required. It is, moreover, interesting to note that Mr. Camara came to this Court seeking to prevent state criminal action against him. 16

In short, neither Camara nor anything else in our history, constitution, and case law justifies the government's reliance on the balancing test in this case.

15 Brief of the United States, pp. 13, 23-4.

<sup>16</sup> Similarly, in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), this Court held a warrantless, forcible search for liquor illegal. In dissent, Burger, C.J., and Stewart, J., emphasized that a large liquor store could easily afford the \$500—fine for refusal to allow inspection, and thereby safeguard the privacy of its store-room.

b. The Government's Attempt by a Balancing Test to take this Case out of the Warrant Requirement would Render Fourth Amendment Guarantees Illusory by Allowing the Government to Judge its own Case where the Courts are Perfectly Competent.

As we have shown a balancing test may not be applied to the warrant requirement in this case, and thus no balancing may be conceived of, which can exempt the government from the warrant requirement here. The government's argument to the contrary perverts both the history of the Fourth Amendment and the case law. But even assuming, arguendo, that a balancing test is appropriate, to strike the balance in the government's favor here would render the Fourth Amendment a nullity.

What vital needs would the government have this Court put on their side of the balance? They suggest the following needs: to prevent bombings of government and other facilities; to prevent other "terrorist activities"; to prevent disclosure of information which, by their nature, are highly confidential and must remain secret; to prevent danger to the lives of informants and agents; to maintain uniform standards; to protect the government's ability to obtain vital information relating to national security, and prevent potential dangers to national security.

<sup>17</sup> Brief of the United States, p. 18, n. 7.

<sup>18</sup> Brief of the United States, p. 18.

Brief of the United States 24; and p. 34, "whose very nature requires that they not be made public."

<sup>20</sup> Brief of the United States, p. 24.

<sup>21</sup> Brief of the United States, p. 27.

<sup>22</sup> Brief of the United States, p. 24.

(1938)

But a closer look at this array reveals that, with one exception, each of these considerations is based on information exclusively within the government's possession, or condusory, or both. Only the government is in a position to evaluate the threat of unspecified terrerist activities. Only the government can evaluate whatever it is in some information's nature that makes its highly confidential,23 or why it must remain secret. Only the government knows who its informants and agents are, let alone what dangers may threaten them. Of course, we may speculate on the effect a lack of uniformity may have on national security surveillance; but (if the government prevails) no one but the Executive branch will ever know anything about these surveillances, much less whether their effectiveness is improved by the uniform standard imposed by successive Attorneys General. On all these points, the government is attempting to judge its own case.

The bald assertion that there is a need to protect the ability to obtain information relating to national security, and to prevent dangers to national security, adds nothing. Everyone admits these needs. But the statement that such needs exist, without more, tells us nothing about why granting the government's claims in cases like this one will fulfill such needs. These are mere conclusory assertions.

On one point we are given independent information—the need to prevent bombings. However, the government never shows why it is that, say, a special warrant under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. \$2510 et seq., would make it any more difficult to

<sup>23</sup> One is reminded of the ancient explanation of why objects fell.

It was in their nature, we were solemnly told, to seek the earth.

prevent bombings.<sup>24</sup> Even with the information supplied by a warrantless surveillance, the C.I.A. office in Ann Arbor was still bombed.

The Fourth Amendment requires not only evidence from which reasonable inferences can be drawn, but also that those inferences be drawn by a neutral and detached magistrate. As Mr. Justice Stewart put it in Coolidge v. New Hampshire, 20 L.ed.2d, 564, 573 (1971):25

<sup>&</sup>lt;sup>24</sup> The absence of such a showing moves one to wonder if the Attorney General may not be over-estimating the danger which domestic dissidents actually pose to national security. One is reminded of Charles Dickens' description of the Coketowners in HARD TIMES (1854 ed.):

<sup>&</sup>quot;Surely there never was such fragile chinaware as that of which the millers of Coketown were made. Handle them ever so lightly and thel fell to pieces with such ease that you might suspect them of having been flawed before. They were ruined when they were required to send laboring children to school; they were ruined when inspectors were appointed to look into their works; they were ruined when such inspectors considered it doubtful whether they were quite justified in chopping people up with their machinery; they were utterly undone when it was hinted that perhaps they need not always make quite so much smoke. Whenever a Coketowner felt he was ill-used—that is to say, whenever he was not left entirely alone, and it was proposed to hold him accountable for the consequences of ay of his acts-he was sure to come out with the awful menace that he would 'sooner pitch his property into the Atlantic.' This had terrified the Home Secretary within an inch of his life on several occasions. However, the Coketowners were so patriotic after all, that they never had pitched their property into the Atlantic yet, but on the contrary, had been kind enough to take mightly good care of it. So there it was in the haze yonder, and it increased and multiplied."

<sup>&</sup>lt;sup>25</sup> Quoting Mr. Justice Jackson in Johnson v. U.S., 333 U.S. 10, 13-14 (1948). "The right of privacy is deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history, shows that the police acting on their own cannot be trusted." McDonald v. United States, 335 U.S. 451, 455-6 (1948).

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

Here, the government neither offers independent information from which the need to perform these surveillances can reasonably be inferred; nor would they allow an independent magistrate make the required inferences. Nor, as we show below at pages 43-44, is there any reason to believe the judiciary incapable of review should the government see fit to present the basic information. By presenting conclusions rather than facts, the government seeks to avoid both the necessity of prior judicial review, and the possibility of any realistic balancing of interests by this Court, should such a balancing be found permissible. The Fourth Amendment ought not be rendered a nullity.

c. Nor May the Government Bootstrap Itself into the Foreign Intelligence Exception with Unsubstantiated Insinuations.

The government argues that national security surveillance of domestic groups is "so interrelated" with surveillance of foreign intelligence operations that the former must come within the exception created for the latter." There are two responses to this line of argument.

(1) The government is attempting to bootstrap itself into the foreign intelligence exception. Although the sealed exhibits now before the Court may contain startling revelations, nothing in the government's argument suggests any evidence from which it may reasonably be inferred that either Plamondon, or the organization whose phone was tapped, were in any way entwined with the intelligence operations of unfriendly foreign powers. Certainly neither the fact that 521 calls went out of the country, nor that 431 calls dealt with "foreign" subject matter constitutes such evidence.27 It should be remembered that ir. Plamondon and those of his persuasion have opposed the Administration's foreign policies. In particular, it is common knowledge that he and other young radicals have opposed the military draft. Many draft resisters and other dissatisfied Americans now reside in Canada, which is a foreign country.28 Thus, it is entirely possible20 that a great number of

<sup>26</sup> Brief of the United States, pp. 29-34.

<sup>27</sup> Brief of the United States, pp. 30-31, n. 13.

<sup>&</sup>lt;sup>28</sup> It should be noted that the large Canadian city of Windsor, Ont., is less than fifty miles from Ann Arbor; and that the population centers of Ontario are within range of a cheap phone call from all of the major cities in the northern United States.

<sup>29</sup> Here we must speculate as the exhibits are sealed.

those 521 calls out of the country involved nothing more sinister than calls to expatriot friends or discussions with foreign groups about the mail (or even the repatriation) of United States prisoners of war. Likewise, whenever two people discuss foreign affairs, the War in Viet Nam, or the international monetary situation, they may be said to have dealt with a "foreign subject matter." Thus, it is entirely possible that a great number of those 431 calls consisted of nothing more sinister than constitutionally protected discussion of current events.

Moreover, even if the government can reveal cooperation between domestic radical groups and individuals abroad, they have not necessarily established any dangerous interrelation with foreign spies. To suggest that such a relation is necessarily established is to engage in guilt by assocation. Mr. Justice Douglas has written:<sup>31</sup>

(continued on next page)

<sup>30</sup> Here, again, we must speculate as the exhibits are sealed.

<sup>&</sup>lt;sup>31</sup> Wm. O. Douglas, op. cit., at 372. Judge Keith, below, put also the matter no less eloquently:

<sup>&</sup>quot;An idea which seems to permeate much of the Government's argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes at the very constitutionnal privileges annot immunities that are inherent in United States citizenship. It is to be remembered that in our democracy all men are to receive equal justice regardless of their political beliefs or persuasions.

<sup>&</sup>quot;The executive branch of our government cannot be given the power or the opportunity to investigate and prosecute criminal violations under two different standards simply because certain accused persons espouse views which are inconsistent with our present form of government.

<sup>&</sup>quot;In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our exist-

"Guilt by association is a dangerous doctrine. It condemns one man for the unlawful conduct of another. It draws ugly insinuations from an association that may be wholly innocent. In June 1945, the Supreme Court stated the American philosophy concerning this concept:

. Individuals, like nations, may cooperate in a common cause over a period of months or years though their ultimate aims do not coincide. Alliances for limited objectives are well known. Certainly those who joined forces with Russia to defeat the Nazis may not be said to have made an alliance to spread the cause of communism. An individual who makes contributions to feed hungry men does not become 'affiliated' with the communist cause because those men are Communists. A different result is not necessarily indicated if aid is given to or received from a proscribed organization in order to win a legitimate objective in a domestic controversy. Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities." (quoting the Bridges case.

It is indeed dangerous to engage in guilt by association—to darkly insinuate, without good evidence or independent

<sup>(</sup>continued from preceding page)

ing form of government. If democracy as we know it, and as our forefathers established it, is to stand, then 'attempts of domestic organizations to attack and subvert the existing structure of the Government' (see affidavit of Attorney General), cannot be, in and of themselves, a crime. Such attempts become criminal only where it can be shown that activity was/is carried on through unlawful means, such as the invasion of the rights of others by use of force or violence."

judgment, that domestic radicals and foreign spies keep such close company that they are indistinguishable; then to assume they are indistinguishable; and thence conclude that they deserve identical treatment.

(2) Even assuming arguendo, that domestic radicals are "interrelated" with foreign agents, this case does not fall within the foreign intelligence exception. The so-called foreign intelligence exception to the Fourth Amendment is, so the government would have it, 32 based on the inherent powers of the President over foreign affairs or as Commander-in-Chief.

But the government's reliance on Chicago and Southern Airlines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948) and the other foreign affairs cases is misplaced. In the very passage of Waterman, quoted in the government's brief, 33 the court makes it clear that they have in mind the foreign, as distinct from the domestic area, 33 U.S., at 111:

"[T]he very nature of executive decisions as to foreign policy is political, not judicial." (emphasis supplied).

More importantly, in Waterman the Court was concerned only with the nature of delegated Presidential power over air carriers, which had no First or Fourth Amendment implications. By contrast, this case poses very serious threats to both Fourth and First Amendment freedoms. As we have seen, the standards and approach to such commonplace administrative questions as airline rates, are entirely out of place where serious Fourth and First Amendment

<sup>32</sup> Brief of the United States, pp. 15 et seq.

<sup>33</sup> Brief of the United States, p. 32.

issues are raised. United States v. Clay, 430 F.2d 165 (CA 5, 1970), relies on Waterman and is therefore distinguishable.

Nor may the government properly rely on powers inherent in the Commander-in-Chief. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) settles this point. Although the President was claiming a threat to national security in a war-time situation, this Court denied the Commander-in-Chief the authority to seize the steel mills. As Mr. Justice Jackson's concurrence makes clear, there is a world of difference between the President's plenary power over the armed forces in theaters of war, and his constitutionally limited power in internal affairs, 343 U.S. 643-4, 646:

"There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and inhabitants . . . military powers of the Commander in Chief were not to supersede representative government of internal affairs . . . No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."

Totten v. United States, 92 U.S. 105 (1875), suggests nothing to the contrary. Totten involved a Court of Claims case brought by one of President Lincoln's spies to recover expenses incurred while abroad in the Confederacy. Unsuprisingly, this Court held that the President had the

<sup>&</sup>lt;sup>34</sup> U.S. v. Curtis-Wright Export Corp., 299 U.S. 304 (1936) involved only Presidential power to embargo munitions exports, and is distinguishable on similar grounds.

authority to dispatch spies into the territory of the enemy. By contrast, the instant case involves sending spies abroad in our own territory to spy on our own citizens, without any independent judicial determination that those citizens are about to engage in "terrorist tactics," much less civil war.

While the foreign intelligence exception perhaps allows the President to send spies abroad, or to spy on foreign nationals in the Unitel States, it does not allow him unlilaterally to decide in peacetime that domestic organizations of United States civilians are exempt from the protection of the Fourth Amendment.

d. Nor do the Years of National Security Surveillance

Before Katz Create any Exceptions to the Fourth

Amendment.

The government implies that the fact of thirty years of thicked national security surveillance established their right to continue such surveillance. There are two responses:

(1) It is fallacious to infer an "ought" from an "is." Since at least 1739, when David Hume brought the matter to our attention, the western world has known that one may not logically infer that something ought to be the case from the mere fact that something is (or has been) the case. 36

<sup>35</sup> Brief of the United States, p. 18.

<sup>&</sup>lt;sup>36</sup> David Hume, A TREATISE OF HUMAN NATURE (Clarendon edition, 1888), Book III, Part I, Section 1, at pages 469-70:

<sup>&</sup>quot;I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary

For if something is (or has been) the case, is it always logically possible that it ought not to be the case any more. The government neglects this elemental logical point when they seek to imply that, just because the Attorney General has been conducting national security surveillances for thirty years, he ought to be allowed to continue to do so. It is logically possible that he ought not be allowed to continue to do so.

(2) Surveillance practices before Katz v. United States, 389 U.S. 347 (1967) are no evidence of constitutional permissibility today. Before Katz came down in 1967 the line of cases beginning with Olmstead v. United States, 277 U.S. 438 (1928), contained the basic law on the constitutional permissibility of electronic surveillance. However, as Mr. Justice Harlan recognized in his concurrence, 389 U.S. at 362 n., this line of cases was finally overruled by Katz.

Although the government's tradition of national security surveillances and their stock memoranda is impressive, they are not the point. Practices and administrative interpretations under Olmstead et seq., are absolutely worthless

<sup>(</sup>continued from preceding page)

way of reasoning, and . . . makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that this not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, its necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention wou'd subvert all the vulgar systems of morality . . ."

now that Olmstead has been overruled. Since Katz overruled Olmstead, the only practices and administrative interpretations that are relevant to this case are those that have taken place since Katz came down in 1967, but the government offers none.

- 2. NO OTHER MEANINGFUL SAFEGUARDS HAVE BEEN SUGGESTED BY PETITIONER.
  - a. Approval by the Attorney General Offers no Protection.

The government suggests that we will be protected against abuse because the Attorney General will apply the same standard in authorizing national security surveillance as Congress provided in the Omnibus Crime Control Act of 1968.<sup>57</sup>

As we have seen, it is elemental that, if the Fourth Amendment means anything, it means that a law enforcement official may not judge his own case. Coolidge v. New Hampshire, 20 Led.2d 564, 573 (1971); Johnson v. United States, 333 U.S. 10 (1948). In that the Attorney is the law enforcement officer primarily responsible for seeing that bombings and other "terrorist activities" do not threaten the national security, it follows that he may not sit in judgment the legality of eavesdropping aimed at uncovering just those threats.

Whether he promises to impose a strict or loose standard is not to the point. He is an interested party. He is paid to be suspicious in these matters. Not only is he a law enforcement officer. He is the chief law enforcement

<sup>37</sup> Brief of the United States, p. 20.

<sup>88</sup> Brief of the United States; pp. 19-20.

officer of the Federal Government, and as such the man directly responsible for ferreting out subversives. Thus, as such he cannot sit in judgment, whatever the standard. An independent magistrate must decide the issue, lest the independence of the judiciary lose its meaning.

- b. Fact that Attorney General May be Answerable, Through President, to the People is no Protection.
- (1) The People will have no way of knowing about national security surveillances. The government would have both the existence and content of these surveillances kept-absolutely secret. If there is no public disclosure, public opinion cannot be a check on abuse of these surveillances.
- (2) The danger that the President may be answerable to the People is the very reason for the Fourth Amendment and approved by an independent judiciary. The Bill of Rights was designed to protect individual rights against tyranny of the majority. The same is true of the independent judiciary. In this respect they are anti-majoritarian. Thus, the very answerability of the President and Attorney General means that they might sacrifice individual rights in the face of strong majority opinion. Therefore, such officers are inappropriate as ultimate guardians of basic liberties.

c. After-the-Fact Judicial Review for Arbitrariness is

The government assures us that "if the Attorney General should ever abuse his authority in authorizing a surveillance, i.e., if the subject of surveillance bore no reasonable relation to national security, the courts could correct the situation."30

As we have already shown, independent judicial review must precede the surveillance to be constitutionally adequate under the Fourth Amendment. But even assuming arguendo that this surveillance is exempt from the warrant requirement, judicial review for arbitrariness would be inadequate. Invasion of privacy is something that cannot be undone. The very reason for the warrant requirement is that privacy cannot be adequately protected by post facto review. But even if post facto review were somehow adequate generally, review merely for arbitrariness is worthless. The standard is so weak as to render such a review a mere palliative, a munificent bequest in a pauper's will. But, as a practical matter, it would be impossible for a private citizen to meet even such a weak standard. To show arbitrary conduct one would have to have shown that the surveillance bore no reasonable relation to national security. However, even if "national security" were not such an impossibility vague phrase, one could never meet his burden as a practical matter. The Attorney General has a monopoly on the information needed to show a lack of relation to national security: This information is secret, and protected by the Executive privilege. In practical fact, this control would be illusory. To be effective judicial re-

<sup>39</sup> Brief of the United States, p. 35, emphasis supplied.

view must occur before the surveillance when the government has an incentive to produce their information, and before an independent magistrate who can deny the petition if adequate information is not produced.

П

IN THE ABSENCE OF MEANINGFUL SAFEGUARDS, THE DANGER OF ABUSE IS CONSTITUTIONALLY INTOLERABLE.

If the government is granted what they claim, an area within which they may eavesdrop while practically and legally immune from any effective scrutiny or control, then there will be absolutely no way to check abuse. For if one such area exists, then no other area can be safe. To justify abusive conduct, one need only use the time-honored common law maneuver of redescribing a troublesome case so that it fits within the inherently vague category "national security," thereby expanding both your power and the category at one stroke.

This enterprise will be particularly easy in the area of national security for, as petitioner repeatedly stresses, to the facts in this area are always detailed and complex, the inferences always subtle. The more complex and detailed the facts, the subtler the inferences, the easier the abusive redescription.

<sup>40</sup> Brief of the United States, pp. 7, 25.

A. The Technological Sophistication of Modern Electronic Eavesdropping Itself Raises Grave Doubts About the Ability of Even the Attorney General to Detect or Control Abuse of Surveillance.

The Court need not be reminded of the incredibly high levels of sophistication which the technology of electronic surveillance has recently attained.

But such powerful technology can itself pose a threat to democratic freedoms. As Max Weber has observed:41

"The question is always who controls the existing machinery and such control is possible only in a very limited degree to persons who are not technical specialists."

When it comes to electronic surveillance of radicals and other threats to the national interest, the experts all work at the Federal Bureau of Investigation. But the approvals and the protections against abuse, we are told, will come from a man trained only as a lawyer, the Attorney General. If Weber's observation has any merit, it is reasonable to expect the Attorney General will have difficulty detecting, much less controlling, any abuse that may occur because of overreaching by the technical experts. The true merit of Weber's point is amply illustrated by the recent history which follows:

ORGANIZATION, A. M. Henderson & T. Parsons, eds., (Oxford ed., 1947) at 337.

<sup>&</sup>lt;sup>42</sup> Indeed, one journalist suggests this is already true. V. Navasky, KENNEDY JUSTICE (1971) at p. 32 writing about Robert Kennedy's tenure as Attorney General:

<sup>&</sup>quot;In the war against crime the technical specialists were the technical surveillance specialists. Nobody not in the business had

- B. Recent History Indicates that the Danger of Abuse is Substantial.
  - 1. THE F.B.I. HAS WILLFULLY DISREGARDED THE RE-QUIREMENT OF PRIOR ATTORNEY GENERAL AP-PROVAL.

Consider, for example, the case of Martin Luther King, Jr. President Johnson issued a directive on June 30, 1965, expressly prohibiting all wiretapping without the specific approval of the Attorney General. This was un unmistakable clarification of what was considered standard policy. We must presume that the F.B.I. and all its agents were aware of President Johnson's directive. Ramsey Clark has stated publicly that he never authorized a tap on Martin Luther King's phone from October 3, 1966, when he became Attorney General, until mid-January 1969:

"Mr. Hoover repeatedly requested me to authorize F.B.I. wiretaps on Dr. King while I was Attorney General. The last of these requests, none of which was granted; came two days before the murder of Dr. King." (emphasis supplied).

### (continued from preceding page)

any idea what was going on — and so the question of whether Kennedy controlled the electronic eavesdroppers was irrelevant. It was never raised. As Henry Ruth, who served in the organized-crime section at the time, reminisces, "You look back and you feel stupid, 'We'd get furious because we'd propose an investigation and they'd say, 'There's absolutely nothing there.' Now I know what this meant—either they knew from bugging that there was nothing there, or they knew that whatever was there was tainted—it couldn't be used as evidence in court because it was the result of a bug." (Emphasis supplied)

<sup>43</sup> V. Navasky, op. cit., at 139.

<sup>&</sup>lt;sup>44</sup> Letter from J. Edgar Hoover to Rep. H. R. Gross of December 7, 1966, reprinted in Navasky, op. cit., at 449.

<sup>45</sup> V. Navasky, op. cit., at 140.

We must presume he is telling the truth. Nevertheless, an F.B.I. agent admitted in a June 1969 hearing in the Cassius Clay case, that he has been assigned to conduct survillance of Dr. King's phone until May 1965, but that he understood that the tap was continued by the F. B. I. until a few days before King was assassinated. As it cannot easily be assumed that an F.B.I. agent is ever misinformed when he makes a statement in open court, the only possible conclusion is that the F.B.I. intentionally broke the law by ignoring both the Attorney General and a specific Presidential directive.

The King case is a clear indication of the spirit with which the law-enforcement experts at the F.B.I. approach the requirement of prior Attorney General approval. As Courtney Evans, the liaison agent from the F.B.I. to Attorney General Kennedy, so succinctly put it:46

"Any law enforcement officer will tell you it is an accepted principle of law enforcement to do what has to be done in the best interests of law enforcement at the time you are doing it."

In simpler terms, the men who operate and understand electronic surveillance equipment are, by F.B.I. precept, above the law.

 EXPERIENCE INDICATES THAT PRACTICALLY ANY-ONE CAN BE REGARDED AS A FIT SUBJECT OF NATIONAL SECURITY SURVEILLANCE.

The Dr. King experience, again, provides fresh historical evidence of the dangers of abuse inherent in the use of a vague category like "dangerous to national security."

<sup>46</sup> Ibid., at 95.

A recent journalistic study of the Kennedy Attorney Generalship indicates that the original surveillance of Dr. King occurred, not because he was suspected of plotting sabotage, but because the supporters of the Civil Rights Bill wanted to protect both Dr. King (and thus the legislation) from allegations that he was being influenced by known subversives. 47 As Mr. Katzenbach relates the episode: 48

"There was some reason to believe that known subversives were making efforts to influence Dr. King's movement and the question was how to deal with that, how to confirm whether they were or not, and under these circumstances, really as much for the protection of Dr. King as for any other reason, and not because of any suspicion or feeling that Dr. King himself was in any way subversive or disloyal, Mr. Kennedy authorized a tap."

So it seems that at least one Attorney General of recent times has interpreted "dangerous to national security" to include anyone who is potentially subject to smear tactics, and may thereby endanger an important piece of legislation. Such an interpretation has a frightening sweep. It includes practically every politically prominent American, whatever his position on the political spectrum.

Thus, recent experience shows that in the absence of the Fourth Amendment safeguards the Attorney General cannot be relied upon to control either the F.B.I. or himself.

<sup>&</sup>lt;sup>47</sup> For a complete account see V. Navasky, op. cit., pp. 135-155.

<sup>48</sup> Quoted in ibid., p. 149.

- C. The Government's Own Brief is Ample Evidence of Danger of Abuse, Absent Fourth Amendment Safeguards.
  - 1. TO PERCEIVE ABUSE ONE MUST FULLY APPRE-CIATE THE DIFFERENCE BETWEEN WHAT IS THE CASE AND WHAT OUGHT TO BE THE CASE.

when directly confronted with an example, if one does not fully understand the difference between what the current practices, policies and institutional arrangements are, and what they constitutionally ought to be. To uncritically identify the current set of policies with the ideal government contemplated by the Constitution, is to reveal a lack of conceptual tools needed to spot failures to live up to the Constitution. If one sees no difference between the real and the ideal, one will be unable to see when present policies are unconstitutional, or otherwise out of step with the basic values on which a democracy rests. This is a dangerous inability, as this Court saw in United States v. Robel, 389 U.S. 258, 664 (1967):

"For almost two centuries, our country has taken a singular pride in the democratic ideals enshrined in its Constitution . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."

The government's brief demonstrates just such a dangerous inability. First, consider their argument that thirty years of national security eavesdropping on the citizenry somehow justifies what was done in this case. Not only is their logic faulty, 60 but the argument assumes that merely

<sup>&</sup>lt;sup>49</sup> See above, p. 23.

because these activities have been carried they embody our constitutional ideals. Nothing could be further from the truth. If this were the case, orderly social progress would cease, and democracy stagnate. Some activities of our officials may be better or worse than others, but it is dangerous in the extreme to infer that because something is official policy it can ipso facto be identified with the requirements of the Constitution and democracy.

Second, consider the language used in their brief. The Solicitor General sides indiscriminately back and forth between the need to preserve "society"50 and the need to preserve the existing system of government, i.e. existing governmental policies. Although the distinction between these two is crucial, he does not seem to have appreciated it. For instance, we are told that the President has the duty to "defend the Constitution and the government created by it."51 But what happens if the government acts contrary to the Constitution, as Respondents argue here? In that case, the President's clear duty is to the Constitution, not to the acts which abuse it. This is no less true if adherence to Constitutional ideals endangers the security of unconstitutional policies or institutions. The controlling duty is the Constitution. The President only has a duty to defend existing policies only as long as they are constitutional. Indeed, if the policy in question is unconstitutional he has an affirmative duty to attack it. The President's duty to defend policies and institutions which are admittedly constitutional is not to the point in this case. Here the is-

<sup>&</sup>lt;sup>50</sup> In the sense of "social organization," see John Locke, SECOND TREATISE ON CIVIL GOVERNMENT, reprinted in E. Barker, ed., SOCIAL CONTRACT (Oxford ed., 1968). "Society" is thus distinguished from "government," the latter being the particular existing institutional organization.

<sup>51</sup> Brief of the United States, p. 15.

sue is whether certain existing policies are constitutional. If one automatically conflates the Constitution and the government, that issue is easily missed.

We are told that "a fundamental right of any society is to preserve itself and to maintain its government as a functioning and effective organism." To be sure, a society has the right to preserve itself and its government. But the President is not society. He is just the fiduciary of society. The only functioning and effective government which he has any right to preserve is a constitutional government, i.e. a government in accord with the will of society. The only policies which he has any right to preserve are constitutional policies. The right of society to maintain its constitutionally chosen government is not before this Court. When the government suggests that it is, they reveal an inability to distinguish between themselves and the authority of the People.

Again, we read "the President must protect the government/and thereby the society for whose benefit it exists

<sup>52</sup> Brief of the United States, p. 15.

<sup>53</sup> In the Lockean sense, see above.

of protecting "the existing system" is implicit in the "responsibility for insuring [the viability of] our system of government," Brief of the United States, p. 15. But the former is only implicit insofar as the existing system is constitutional, which is the point here at issue. In Attorney General Mitchell's affidavit, Brief of the United States, p. 3, he speaks of the need to protect the nation from attack on "the existing structure of the government." At p. 14, the Solicitor General again asserts that the issue here is the "protection of the fabric of society itself" and the "existence of an organized society." Perhaps so, but only insofar as the government is trying to rend the fabric of the Fourth Amendment.

society insofar as the policies are being protected are constitutional. If they are not, then protecting the policies is attacking society. By protecting the existing government one does not thereby automatically protect society. The real subversive is the man who protects the existing government without ever considering the possibility that these officials may be doing something unconstitutional.

If the government is unable to appreciate this elemental distinction when preparing a brief to the Supreme Court of the United States, we hesitate to imagine what happens in the hustle and rush of everyday law enforcement. Our constitutional liberties ought not hang by so fine a thread.

### 2. GOVERMENT'S RELIANCE ON PAST PRACTICE.

The government's attempt to use past eavesdropping practices to establish their constitutional claim is itself the best evidence of their willingness to expand any "national security" beyond all limits.

As was argued above, because Katz overruled the Olmstead line of cases, past eavesdropping practices under Olmstead establish nothing about a constitutional claim being made under Katz. This being the case, all this past practice really establishes is an interpretation of Section 605 of the Communications Act of 1934. Thus, what the government is trying to do in this case is argue that a construction of a statute by past practice establishes a constitutional exception to the Fourth Amendment. If the government can so easily infer exceptions to the Consti-

<sup>55</sup> Brief of the United States, p. 18.

tution from practices under a statute, it should be simplicity itself to infer the right to eavesdrop on whomever they please from the right to eavesdrop on 'dangers to the national security."

#### III.

THE ONLY HOPE OF PREVENTING AND CONTROLLING ABUSE IS TO ADHERE TO FOURTH AMENDMENT SAFE-GUARDS.

The only effective safeguards against abuse of electronic surveillance are those provided by the Fourth Amendment: (1) approval of an independent magistrate before surveillance begins; and (2) adherence to the disclosure requirements of Alderman v. United States, 394 U.S. 165 (1969).

### A. Approval of an Independent Magistrate Before Surveillance Begins.

Difficult as it may sometimes be to control abuses of electronic surveillance, the Constitution requires that we try. For the courts to leave the field merely because abuses will be difficult to detect and correct is to sanction official abuse by default. As early as Weeks v. United States, 232 U.S. 383, 390 (1913) this Court recognized that such a course is unthinkable:

"The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Con-

stitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." (emphasis supplied)

Of course, a clear constitutional requirement of prior approval by an independent magistrate will not guarantee that the F. B. I. and the Attorney General will not abuse their authority. But no ruling of this Court ever guarantees any result in that sense. Were such a guarantee required there could be no rule of law.

1. SUCH REVIEW DOES NOT DENY THE AUTHORITY OF THE ATTORNEY GENERAL TO DEFEND SOCIETY, IT MERELY CONTROLS THE METHODS USED.

The government would have us believe that any attempt to observe the prior judicial approval requirement of the Fourth Amendment necessarily denies the authority of the Executive to defend the Constitution. We are told that the possibility of abuse is "not a valid basis for denying the Attorney General the authority" to use surveillance in defense of the national interest.<sup>56</sup>

However, no one has ever asserted that the Attorney General is without authority to conduct electronic surveillances in defense of the society. The issue here is not whether he has such authority, but whether he must observe certain procedures in the exercise of that authority. Respondents question not the end which the government seeks, but the means by which they seek it.

Mr. Justice Douglas put it well:57

"The Almanac of liberty . . . is filled with episodes where the means are outlawed, though the

<sup>56</sup> Brief of the United States, p. 35...

<sup>57</sup> Wm. O. Douglas, op. cit., at 178.

ends sought are worthy. The greatest battles for liberty indeed have been fought over the procedures which police and prosecutors may use."

The Sixth Circuit Court of Appeals saw the point equally clearly when they wrote:58

"[I]t should be noted that the Fourth Amendment's judicial review requirements do not prohibit the President from defending the existence of the state. Nor does the Fourth Amendment require that law enforcement officials be deprived of electronic surveillance. What the Fourth Amendment does is to establish the method they must follow."

# 2. NOR CAN THE GOVERNMENT ARGUE THAT THE JUDICIARY IS INCAPABLE OF SUCH REVIEW.

The linchpin of the government's argument against prior judicial approval of national security surveillance is the alleged inability of the judiciary to do the job:50

"[N]ational security surveillance cases, however, ... generally [involve] a large number of detailed and complicated facts whose interrelation may not be obvious to one who does not have extensive background information, and the drawing of subtle inferences."

It seems that because the judiciary will not have extensive background information, and because courts lack the mental ability to draw subtle inferences, judicial review should not be required.

<sup>58</sup> United States v. United States District Court, see Appendix to Respondent's brief.

<sup>59</sup> Brief of the United States, p. 25.

The obvious response is that courts handle detailed and complicated facts daily, and regularly make very subtle inferences. Any common-garden-variety anti-trust case involves facts of staggering detail and complexity. Nevertheless, the government shows no reluctance to bring anti-trust litigation before the courts. As for the judiciary's ability to draw subtle inferences, it is presumptive in the extreme for the government to tell this Court, or other judicial officers, that they lack the necessary intelligence.

Nor is it possible to respond that the inferences in the national security area are qualitatively different. Just last June the government eagerly brought before the courts (what they regarded) as a very grave issue of national security, New York Times Co. v. United States, 403 U.S. 713, 29 L. ed. 2d 822 (1971). The facts were complex, the inferences subtle. Nevertheless, the government did not hesitate. Indeed, the federal courts have traditionally had no trouble handling the most difficult and sensitive national security cases, whether they arise from the seizure of steel mills in war-time or from nuclear blasts under Amchitka.

If there were really any doubt about the ability of the federal bench to understand these matters, it would be an easy matter to direct the requests to some judicial officer who has the necessary experience and intelligence. Many a distinguished federal judge has served as a prosecutor, attorney general, or in some other law enforcement capacity. Moreover, if permission to eavesdrop is denied by some "dull" magistrate, nothing prevents the government from adding a small piece of information to their case and reapplying before some other judicial officer. "

<sup>.60</sup> It is interesting to note a curious omission in the government's presentation. If judges lack ability as the government argues, there must be instances where the government has been refused permission. Yet they cite no instances where magistrates have refused even Ominibus Crime Control Act warrants.

In reality the government's argument goes as follows: "In these cases there is never a reasonable basis on which an independent judicial officer can base his permission. Therefore, an independent judicial officer lacks the ability to do his job. Therefore, he ought not be allowed to pass on these surveillances." But this would prove too much. A law enforcement officer can always argue that the reason there is no basis to approve the surveillance is that the magistrate is too stupid and the facts too complicated. Rather than erase the Fourth Amendment, the government adds: "And national security is a special case." However, they have not given this Court any particular reasons to believe this ipse dixit. Nor have they explained why all national security cases are beyond the ken of judicial officers. Surely there must be a straight-forward national security case occasionally. 61 One suspects the government of engaging in a "definitional stop."62 That is, national security cases are special because the government defines national security cases as special. There all discussion must end.

# B. Adherence to the Disclosure Requirements of Alderman.

In Alderman v. United States, 394 U.S. 165 (1969), Mr. Justice White made it clear that in camera review for "arguable" relevance was an insufficient safeguard of Fourth Amendment rights. If an individual is to have

<sup>&</sup>lt;sup>61</sup> Indeed, the national security cases on which the government relies in their brief seem to have been handled adequately. Else why would the government rely on them?

<sup>62</sup> See H. L. A. Hart, CONCEPT OF LAW (Oxford ed., 1961).

<sup>68</sup> Disclosure was required "even though attended by potential danger to the reputation of safety of third parties or to the national security," 394 U. S. at 181.

any realistic chance of discovering whether or not the government has conducted illegal eavesdropping, he must see the record of surveillance. The trial court is in no position to do the job.

First, the court is never in a position to "place the transcript... of the surveillance alongside the record evidence and compare the two for textual or substantive similarities," 394 U.S. at 182. As suppression hearings occur before the main trial, the record evidence will always be limited.

Second, the court will not know what to look for. As Mr. Justice White puts it, 394 U.S. at 182:

"[A] good deal more is involved. An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case."

At this point Justice White drops a very interesting footnote, 394 U.S. 183 n. 14:

"In both the volume of the material to be examined and the complexity and difficulty of the judgments involved, cases involving electronic surveillance will probably differ markedly from those situations in the criminal law where in camera pro-

cedures have been found acceptable to some extent."

This Court, then, carefully distinguished cases involving complex facts and difficult judgments from cases where in camera examination is acceptable. He goes on to quote Dennis v. United States, 384 U.S. 855, 874-5, (1966), a case involving communists in labor unions, for the proposition that, 394 U.S. 183 n. 14:

"' [t]rial judges ought not be burdened with the task or the responsibility of examining sometimes voluminous ... testimony,' and ... it is not "realistic to assume that a trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities."

Here, on the government's own showing, <sup>64</sup> the case "involves a large number of detailed and complicated" facts. Moreover, the inferences that must be made are 'subtle." This being the case it is impossible to expect even the most conscientious judge, by himself, to see all the possible ways in which something might be "arguably relevant." Again, on the government's own showing, <sup>66</sup> the trial court "does not have the extensive background information" necessary. Thus, he is especially likely to pass over some "colorless" bit of information which will have special and vital significance to the defendant. In short, the very factors upon which the government relies to argue for an exception from judicial review before surveillance militate

<sup>&</sup>lt;sup>84</sup> Brief of the United States, p. 25.

<sup>65</sup> ibid.

<sup>66</sup> ibid.

for complete disclosure to the defendant after surveillance. 67

Nor is it sensible to argue that Mr. Justice White meant, in the interests of administrative convenience, to relieve lower courts of the burden of sifting a voluminous record. The point, rather, is that the danger of an inadequate job being done by an individual trial judge is substantial, by far too substantial to meet Fourth Amendment requirements. Even if the concern were administrative convenience, the answer is to disclose to the defendant. Let him do all the work of sifting through volumes of records, rather than the court. Alderman makes no sense if read as an exercise of this Court's supervisory powers.

#### IV

PALMER RAID PERIOD PROVIDES A CLEAR EXAMPLE OF HISTORY THE GOVERMENT WOULD DOOM US TO REPEAT.

Once before in this century the Attorney General has, in the name of protecting the national security against domestic subversives, laid claim to an area within which his "administrative" procedures would be exempt from the Bill of Rights. In the years from 1917 to 1921 the government accomplished the concerted, deliberate destruction

<sup>&</sup>quot;When the truth is buried underground, it grows, it chokes, it gathers such an explosive force that on the day when it bursts out, it blows everything up with it. We shall soon see whether we have laid the mines for a most far-reaching disaster of the near future." Emile Zola, "J'accuse! . . . ", reprinted in THE LAW AS LITERATURE (Simon and Schuster ed., 1966) at 237.

of the I. W. W., 68 the first real industrial labor union. This was done in the name of administrative control of "alien" radicals. It culminated with the Red Raids conducted by Attorney General A. Mitchell Palmer in 1919-1920. These raids involved such flagrantly lawless and massive invasions of individual rights that a distinguished group of lawyers (including Felix Frankfurter and Roscoe Pound) denounced the Attorney General in these outraged terms: 69

"Under the guise of a campaign for the suppression of radical activities, the office of the Attorney General, acting by its local agents throughout the country, and giving express instructions from Washington has committed continual illegal acts. Wholesale arrests of both aliens and citizens have been made without warrant or any process of law; men and women have been jailed and held incommunicado without access of friends or counsel: homes have been entered without search-warrant and property seized and removed; other property has been wantonly destroyed; workingmen and working women suspected of radical views have been shamefully abused and maltreated. Agents of the Department of Justice have been introduced into radical organizations for the purpose of informing upon their members or inciting them to activities; these agents have even been instructed from Washington to arrange meetings upon certain dates for the express object of facilitating wholesale raids and arrests.

<sup>68</sup> International Workers of the World, or "Wobblies."

<sup>69</sup> R. G. Brown, Zechariah Chafee, Jr., Felix Frankfurter, Ernst Freund, Swinburne Hale, Francis Fisher Kane, Alfred S. Niles, Roscoe Pound, Jackson H. Ralston, David Wallerstein, Frank P. Walsh, Tyrell Williams, "To the American People—Report upon the Illegal Practices of the United States Department of Justice," (NY: American Civil Liberties Union, 1920).

A. In Relevant Respects, the Factual and Legal Claims Made by the Government in that Period are Strikingly Parallel to Those Made Here.

The history of the Palmer Raid period<sup>70</sup> presents an instructive and striking parallel to this case. Some twenty-six years before the Palmer Raids, the United States Supreme Court decided Fong-Yue-Ting v. United States, 149 U. S. 698 (1893). They held that deportation was merely an administrative process for the return of unwelcome and undesirable alients to their own countries, not a punishment for crime. A few years later the Court decided Yamataya v. Fisher, 189 U.S. 86 (1903), the famous Japanese immigration case. The Court held that the Executive branch had sole and final authority to determine an alien's right to remain in this country, provided the alien was not "arbitrarily" deported, i.e. was allowed an administrative hearing. The court would not consider the fairness of the hearing, 189 U.S. at 100:

"It is true that she pleads a want of knowledge of our language; that she did not understand the nature and the import of the questions propounded to her; that the investigation made was a 'pretended' one; and that she did not, at the time, know that the investigation had reference to her being deported from the country. These considerations cannot justify the intervention of the courts."

It was enough that the alien, unable to understand or speak English, might have brought the matter to the attention of the immigration officials, *ibid*:

The following discussion is based on Prof. Wm. Preston, Jr., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933 (1963), a publication of the Harvard University Center for the Study of the History of Liberty in America.

"They could have been presented to the officer having primary control of such a case, as well as upon an appeal to the Secretary of the Treasury, who had power to order another investigation if that course was demanded by law or by the ends of justice."

As long as there was a hearing, the Court could perceive no ground for judicial "intervention, ... none for the contention that due process of law was denied," 189 U.S. at 102. See also, Pearson v. Williams, 202 U.S. 281 (1906). Little did the Court suspect that by 1919 the Executive branch would be using these decisions as the justification for mass arrests, general searches, and incommunicado interrogations of anyone deemed dangerous and undesirable. As it turned out, what the Court had done was, in effect, to do what the government is asking this Court to do in the instant case—create an area, exempt from the Bill of Rights, within which the Executive branches' treatment of individual liberties will be secure from any scrutiny but its own.

Abuses developed slowly. In 1908 a thorough search revealed no deportable anarchist aliens. In the eight year period before the Palmer Raids only fourteen aliens were deported for radical beliefs. From 1909 to 1912 a determined effort was made to silence the I.W.W. and their anti-capitalist rhetoric. It failed miserably. With the Bill of Rights supporting the Wobblies, there seemed to be no legal way to silence them. As one old farmer was reported to have complained, "You can't kill 'em; the law protects 'em." In 1912 under pressure from the solid citizens of

<sup>71</sup> ibid., p. 33.

<sup>72</sup> ibid., p. 43.

Southern California, President Taft pronounced the I.W.W. "lawless flotsam and jetsam," and promised "to take decided action." However, a scrupulously careful examination by the Department of Justice failed to reveal sufficient evidence to sustain a criminal indictment. Because the Attorney General had yet to discover the usefulness of deportation as an anti-radical weapon, he regretfully concluded that there was no way to "show the strong hand of the United States," as Taft desired."

Again in 1915, another federal investigation revealed no grounds for federal action. The As a general matter, before World War I the suppression of labor organizers was thus left to the States and to the vigilantes.

However, the threats of World War I changed matters. In the face of a rising nativist feeling, Congress abandoned the conviction that radicalism could be a homegrown phenomenon. Shutting its eyes to the evidence of shocking industrial conditions Congress keyed its solution of domestic unrest to the mistaken theory that described current radicalism as a foreign import of the new immigration. Then, as now, the tendency was to insinuate that domestic dissidents are "interrelated" with foreign ene-

<sup>73</sup> ibid., p. 53.

<sup>74</sup> ibid., p. 54.

<sup>75</sup> ibid., p. 60.

<sup>&</sup>lt;sup>76</sup> ibid., pp. 75, 83.

<sup>&</sup>lt;sup>77</sup> ibid., p. 76. Evidence indicates that most workers joined the I.W.W. to make effective protest, rather than in support for their radical sims, ibid. p. 97.

mies, and then bootstrap to the conclusion that the Bill of Rights no longer applied.78

In 1917 Congress overrode President Wilson's second veto and passed a vague new immigration law, 39 U.S. Stat. 889:

"Any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy or the otherthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

The Congress that passed this statute and amended it in 1918, like the Congress that passed the Omnibus Crime Act, was impatient with the procedures of the Courts. Congressmen did not want to determine the rights of anarchists and

<sup>78</sup> ibid, pp. 76, 91, 100. During World War I the insinuations became less subtle. Consider the following headlines from the period: "Kaiser's Coin Pays for I. W. W. Sabotage," San Francisco Chronicle, Feb. 22, 1918, p. 1, col 3; "Bolsheviki Ship Brings Gold to Aid I. W. W.," San Francisco Chronicle, Dec. 24, 1917, p. 1, col. 8; "Bolsheviki and I. W. W.'s Planned U. S. Revolution," Indianapolis News, Feb. 21, 1919, p. 3, col. 1. Generally see Eldridge R. Dowell, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES (DaCapo edition, 1969), pp. 34-44; and at p. 36, "it is interesting to note that no case of an I. W. W. saboteur caught practicing sabotage or convicted of its practice is available."

This country has a long tradition of explaining dissent, unionism, and radicalism as the product of "foreign" influences. E.g., in People v. Fisher, 14 Wend. 9 (N.Y. 1835) a group of tailors were indicted for conspiring to injure trade and commerce. Judge Edwards lectured them as follows: "Every American knows, or ought to know, that he has no better friend than the laws, and that he needs no artificial combination [i.e., union] for his protection . . . They are of foreign origin, and I am led to believe are mainly upheld by foreigners . . . ". (emphasis added).

other radicals "by the long slow process of courts." As one representative said, "A long delayed snail-paced" trial would only encourage radicals "to ply their trade instead of making an example of them." Nor was Congress concerned that the "alien" involved may have resided in the United States for years. As Prof. Preston summarizes the official feeling at the time: "If repression was the aim, then a non-criminal, administrative procedure was far more efficient [than the courts], and gave . . . officials great latitude in defining guilt."

Before applying the 1917 Act, however, Secretary of Labor Wilson ordered a full-scale investigation of the I.W.W.'s literature and organic documents. This examination revealed "no lawless purpose," as did a similar investigation in 1918. The Secretary ordered that his inspectors thoroughly substantiate personal guilt before requesting a warrant of arrest. Warrants would issue, the Secretary ordered, only after an exhaustive inquiry into the alien's beliefs, teachings, and actions. Indeed, the Secretary insisted on a standard of personal guilt as exacting as that in judicial proceedings. Even before Sec. Wilson's action, the immigration officials had decently stiff

<sup>&</sup>lt;sup>79</sup> ibid., p. 83.

<sup>80</sup> ibid., p. 83. Consider the comments of Rep. Slayden of Texas:

<sup>&</sup>quot;Now I would execute these anarchists if I could, and then I would deport them, so that the soil of our country might not be polluted by their presence even after the breath had gone out of their bodies. I do not care what the time limit is. I want to get rid of them by some route... or by execution by the hangman. It makes no difference to me so that we get rid of them."

<sup>81</sup> ibid.

<sup>82</sup> ibid., pp. 101, 189.

<sup>83</sup> ibid., p. 102.

formal standards to follow. Under the Departmental rules, e.g. an arrest warrant was only issued when an inspector had made out a prima facie case, and accompanied the application by "some substantial supporting evidence." Telegraphic application for a warrant was only permitted "in case of necessity" or "when some substantial interest of the government would thereby be served. Thus, initially the Secretary was cautious about his interpretations. As in the instant case, an effort was made to create and impose an administrative substitute for probable cause.

However, these administrative safeguards died young. By March 1918 the commissioner general was of the opinion that Congress: ss:

"[a]lso intended to reach the passive and insidious forms [of radical activity] . . . as the only assuredly effective means of curing the active forms; in other words intended to reach the word as well as the deed, and in some respects, to reach the underlying thought as well."

Because of pressure from the lower echelons, so the standard rapidly went from personal guilt to "evil thoughts" or membership in a group known for their subversive ideas, to the joy of state prosecutors and employers. The Supreme Court's decisions were interpreted to give the Executive authority to deport aliens on the grounds of expediency, whenever their presence was "deemed incon-

<sup>84</sup> ibid., p. 14.

<sup>85</sup> ibid., p. 84 B

<sup>86</sup> ibid., p. 102.

stribid., p. 100: "Prosecuting attorneys and employers also looked upon deportation as the most flexible and discretionary weapon available for their attack upon radical labor agitators. Proof of individual guilt was the great stumbling block in labor disturbances."

sistent with the public welfare. What standards remained at the Cabinet level never were applied in practice. The subordinates were trained in law enforcement. They had difficulty making fine theoretical distinctions, much less applying them.

Thus, when a man said he was opposed to capitalism, they took him to be an anarchist. In practice the standards for arrest and deportation in I. W. W. cases became about as loose as any the immigration bureau inspectors could devise: e.g., having the appearance and attitude of an I. W. W., even though not a member; sympathetic association with anarchists, the I. W. W. or similar groups; "living off summer's earnings" (a characteristic typical of harvest and lumber workers in the off-season); "an abnormal head which indicates criminal propensities;" a "predilection for agitation;" or a tendency to "spread radical propaganda.' Nor could formal pronouncements by the Secretary of Labor restrain the abuse:

"In theory, the wayward Bureau of Immigration was only carrying out the desires and decisions of the Secretary of Labor. It had no independent policy-making authority. In practice, the bureau had captured control of deportation, ignored the interpretation of Secretary Wilson and turned the superior department officials into submissive rubber stamps."

Despite the best intentions of the Secretary, the privileged area created by the Court in 1893 had become a monster by 1920.

<sup>88</sup> ibid., p. 11.

<sup>89</sup> ibid., p. 188.

<sup>90</sup> ibid., pp. 178-9.

<sup>91</sup> ibid., p. 222.

In the government's enthusiasm to stamp out the I.W.W. they resorted to a number of tactics. In September 1917 Bureau of Investigation agents simultaneously raided I.W.W. headquarters, locals, and residences throughout the nation in an effort to get enough information for criminal charges. After the leaders of the I.W.W. were indicted and under trial for criminal conspiracy, the government conducted a concerted program to cut off funds for the defense effort. The Postmaster General banned I.W.W. literature from the mails. The ban included not only requests for contributions to the defense of the Chicago prisoners, but even the blank contribution forms themselves.

The tactics also included the general search. Anxious to find any mail that might contain contributions, one inspector's search warrant contained the following particular description: "5,000 envelopes bearing U.S. stamps and indicating proper payment of postage thereon." Officers were authorized to seize material not covered by such warrants if the letters in question "appear... to be part of the general scheme and propaganda of the L.W.W." Such searches and seizures are so general as to approach those effected by modern electronic surveillance. Of course, President Wilson's administration justified these searches as mere administrative procedures,

<sup>92</sup> ibid., p. 118.

<sup>&</sup>lt;sup>83</sup> ibid., p. 146.

bited because it contained the word "sabotage." Certain literature was found to have "disloyalty unexpressed," or a "somewhat more audible undertone of disloyalty," p. 147.

<sup>95</sup> ibid., p. 148.

<sup>96</sup> ibid.

pursuant to the Executive's power to deport subversive aliens.

Ultimately the arrests began under the supervision of a young man by name name of J. Edgar Hoover, then head of the Justice Department's old General Intelligence Division. Incommunicado interrogations were favored. The government could thereby convict a man out of his own mouth, without the unfortunate necessity of exposing their undercover informers. Indeed, much of the illegal and abusive treatment given the prisoners may be traced to the official decision to protect undercover informers. Thus, Mr. Hoover opposed counsel being present at the interrogation, for with counsel present the prisoner would not incriminate himself. The government then would be forced to blow their counter-espionage agents' cover at the very start of a promising career.

Again, in borderline cases where deportation seemed debatable, the government would resort to information from undercover informants. Since confidential information would not appear in the record, the alien would have no way of answering it. Prof. Preston summarizes: "Weak, technical cases were to become substantial, deportable ones on the secret word of undercover informants. With their reliability unquestioned, and their statements unchallenged, these agents would become the real arbiters of the immigration laws." Similarly, in the instant case, the government seeks to keep secret the testimony of an undercover electronic informant. Without disclosure there can be no way to judge the legality and worth of the surveillance. Again, the government seeks to be the sole arbiter of the Bill of Rights.

<sup>97</sup> ibid., p. 221.

<sup>98</sup> ibid., p. 214.

It is said of the young Mr. Hoover that he "did not think of [the] program as either autocratic or outrageous. [H]e simply carried traditional immigration practices to a logical conclusion and . . . expected good results." We respectfully submit that democracy in the United States cannot afford another round of such "good results."

### CONCLUSION

Wherefore, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: December 10, 1971 .

<sup>99</sup> ibid., p. 220.

# In the Supreme Court

United States

Supreme Court, U. FILED.

OCTOBER TERM, 1971

DEC 20\ 197

ROBERT SEAVER OF

No. 70-153

UNITED STATES OF AMERICA, Petitioner

UNITED STATES DISTRICT COURT, Respondent

BRIEF OF BLACK PANTHER PARTY, NATIONAL LAWYERS GUILD AND NATIONAL CONFERENCE OF BLACK LAWYERS. AS AMICI CURIAE ON BEHALF OF RESPONDENT

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# In the Supreme Court

OF THE

### United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA, Petitioner

VS.

UNITED STATES DISTRICT COURT, Respondent

# BRIEF OF BLACK PANTHER PARTY, NATIONAL LAWYERS GUILD AND NATIONAL CONFERENCE OF BLACK LAWYERS AS AMICI CURIAE ON BEHALF OF RESPONDENT

### THE INTEREST OF AMICI CURIAR

Black Panther Party, National Lawyers Guild and National Conference of Black Lawyers are organizations that have been concerned with the development of the law of political and civil rights in the United States for from three to forty years. The organizations, their members and their attorneys have exhibited a tireless concern for the maintenance of constitutional liberty, primarily in the interest of minorities and oppressed individuals in the society. The instant case raises important constitutional issues concerning the rights of groups and individuals to be

free from warrantless electronic eavesdropping. It is a case of great interest to all those concerned with the protection of liberty in this country, but especially so for those who, like each amicus curiae, represent large numbers of the poor, the non-white, and the politically active.

Counsel for the parties have consented to the filing of the attached brief amici curiae and leave is accordingly respectfully sought to file it.

### ARGUMENT

I. THE POWER ASSERTED FOR THE EXECUTIVE IS JUDICIAL AND THEREFORE VIOLATES THE FUNDAMENTAL CONSTI-TUTIONAL DOCTRINE OF SEPARATION OF POWERS.

Black Panther Party, National Lawyers Guild and National Conference of Black Lawyers as amici curiae respectfully urge the Court to uphold the powerful constitutional positions of the courts below. The contention of the Executive Department<sup>1</sup> must be sternly rejected. The Attorney General seeks to abrogate the fundamental constitutional principle of the separation of powers.

The Attorney General has variously stated the position of his department in the several cases around the circuits testing the power of the President to engage in wiretapping without a warrant. In his brief

It would be misleading to refer to the petitioner, as the Government, or as the United States, however common the practice, in the context of the issues of this case. The petitioner is but one of the separate and independent arms of the Government, or of the United States, to wit, the Executive.

in United States v. Hilliard, pending in the Ninth Circuit (No. 71-2097), in which the issue is precisely the same as the issue here, he says:

"The issue presented to this court for decision is whether the President, acting through the Attorney General, may constitutionally authorize the use of electronic surveillance to protect the United States against the overthrow of the Government by force or other unlawful means or any other clear and present danger to the structure or existence of the Government."

The Executive Department argues that the President can do it. The Constitution says he cannot.

The Fourth Amendment places the power to decide when there shall be a search and seizure, not in the Executive Department, but in the Judicial Department (Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367 [1948]). Thus, by the familiar rule of exclusion, applied to a government of delegated powers only, it is plain that the Constitution denies to the Executive the power it asserts the right to exercise in this case. (Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250 [1911].)

<sup>&</sup>lt;sup>2</sup>Amici curiae do not understand the Attorney General to challenge this Court's holding in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967), that wiretapping is a form of search and seizure, subject to the requirements of the Fourth Amendment.

<sup>3</sup>That the

<sup>&</sup>quot;And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism." Springer v. Government of Philippine Islands, 277 U.S. 189, 48 S.Ct. 480 (1928).

Nor was the denial of the power asserted, when the Constitution was drafted, accidental.

The Framers of the Constitution deliberately and expressly undertook to implement the philosophy of government of Charles Louis de Secondat, Baron de la Brede et de Montesquieu.

To Montesquieu, and to Madison and Hamilton following him, the principle of the separation of powers was the "sacred maxim of free government" (The Federalist Papers, No. 47; see Dietze, The Federalist, p. 126 [Johns Hopkins Press, 1960]). To Madison, "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny" (ops.cit.).

And it was precisely to block tyranny that the Constitution separates the powers of government into interdependent, but independent, compartments. "'Separation of powers'... was looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose his unchecked will." (United States v. Brown, 381 U.S. 442, 443, 85 S.Ct. 1707 [1965].)

The distribution of powers to three interdependent branches of government accomplished a system of checks and balances, "established in order that this should be a 'government of laws and not of men." (Brandeis, J., dissenting in Myers v. United States, 272 U.S. 52, 47 S.Ct. 21 [1926].)

Understandably, efficiency in the administration of government was consciously sacrificed in favor of the exalted purpose of the doctrine. The principle was "not instituted with the idea that it would promote governmental efficiency" (United States v. Brown, supra), but "to save the people from autocracy" (Brandeis, J., supra).

Notwithstanding the materials defining the significance and applicability of the doctrine of separation of powers are "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh" (Jackson, J., concurring in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863 [1952]), this Court has considered the matter sufficiently to establish with blazing clarity that the Constitution denies to the President the power the Attorney General claims he has.

Youngstown Sheet and Tube, supra, the steel plant seizure case, is definitive and controlling. In that case, as here, the President claimed the right to exercise a power assigned by the Constitution to a different department. In those circumstances, Mr. Justice Jackson's concurring opinion explained, the test of the President's power finds that "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers, minus any constitutional powers" of another department over the matter. Mr. Justice Jackson's caveat is accordingly explicitly applicable to the instant case:

"Presidential claim to a power at once so conclusive and preclusive [because if the President can exercise the power, no other department can] must be scrutinized with caution, for what is at stake is the equilibrium established by our Constitutional system."

The impact of the doctrine falls equally upon all departments, whenever any one assumes a power assigned to another, or when one department purports to acknowledge a nonexistent power in one of the others. See, for example, United States v. Brown, supra, for restrictions on the legislative department; Meriwether v. Garrett, 102 U.S. 472, 26 L.Ed. 197 (1880), and Muskrat v. United States, supra, for restrictions on the judicial department; and Youngstown, supra, for restraint upon the executive department.

In all these illustrations, no principle is more basic than that stated in *Lichter v. United States*, 334 U.S. 742, 68 S.Ct. 1294 (1948):

"In peace or in war, it is essential that the Constitution be scrupulously obeyed, and particularly that the respective branches of the government keep within the powers assigned to each by the Constitution."

But the Attorney General argues here for recognition of a power in the Executive that would destroy the equilibrium, shatter the principle of separate powers that is the bulwark against tyranny. Plainly, if any one department of government may, unchecked by another department, first determine the existence of, then act to meet an emergency so grave as to threaten "the structure or the existence of the government," then distribution of the powers of that government among three independent branches is brought to an inglorious end.

Mr. Justice Jackson, himself an Attorney General before he joined this Court, understandably foresaw future claims of emergency Presidential power, and the deadly hazard inherent in acknowledging such demands. Once more in Youngstown, he said:

"The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies."

The Attorney General asks the Court to acknowledge that the President enjoys exactly these constitutionally forbidden powers. The Court cannot do less than recognize the nature and quality of the threat to constitutional government in the Attorney General's menacing demand.

The Court must strike down the claim to unilateral power, uphold the opinions and decisions of the courts below, proclaim again with Mr. Justice Jackson in Youngstown:

"With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by Parliamentary deliberations.

"Such institutions may be destined to pass away. But is is the duty of the Court to be last, not first, to give them up."

#### II. CONGRESS DID NOT PURPORT TO GRANT THE PRESIDENT THE POWER HE CLAIMS

It is the Attorney General's contention that the President has the inherent constitutional power to tap wires without a warrant, whenever the Chief Executive unilaterally determines that an internal emergency exists which endangers the security of the nation.

Evidently mindful of the extraordinary and hazardous nature of the power thus attributed to the executive department, the Attorney General attempts to back up its original contention with the claim that Congress has delegated this unprecedented authority to the President. Both claims are meritless.

The power claimed for the President—if it can constitutionally exist at all in the government—must first be granted by the legislative department, since it is nowhere to be found in the Constitution itself, either explicitly or implicitly. If individual rights are to give way to national security considerations, an attempted exercise of legislative power, while not constitutionally conclusive, is essential.

The fact that power may exist in the Government to create an exemption to the Fourth Amendment does not vest it in the President, and the alleged need for new legislation does not serve to enact a law giving the President this power, nor does it repeal or amend existing laws. In the present case the Attorney General has not pointed to any language in the Constitution, in the statutory law, or in the case law of the United States which would grant authority to the President, the Attorney General, or any federal law enforcement agency to exempt themselves from the restrictions of the Fourth Amendment.

Rather than investing the Executive with the power to circumvent the Fourth Amendment, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. sections 2510 et seq. (Supp. V, 1969), as a whole embodies an explicit recognition by Congress that the Fourth Amendment requires prior judicial approval of proposed searches and seizures of oral communication by electronic eavesdropping. Section 2511(3), which the Attorney General points to as support for his position, reads as follows:

"(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such

measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." (18 U.S.C. § 2511(3) [Supp. V, 1969].)

The language utilized by Congress is expressly not the language used to confer a grant of power. As Judge Edwards pointed out in the court below, that language makes it clear that Congress has maintained a completely neutral position in the present controversy (444 F.2d 651, 664).

The legislative history of Section 2511(3) also supports the conclusion that Congress did not attempt to define the "constitutional power of the President," but intended only to leave that power exactly as it had been prior to the 1968 legislation. The discussion among Senators McClellan, Holland and Hart concerning the purpose of Section 2511(3), as summed up by Senator Hart, is conclusive:

"Mr. Hart: A few days ago I wondered whether we thought that we nonetheless could do something about the Constitution. However, we are agreed that this language [of sec. 2511(3)] should not be regarded as intending to grant any au-

thority, including authority to put a bug on, that the President does not have now.

"In addition, Mr. President, as I think our exchange makes clear, nothing in section 2511(3) even attempts to define the limits of the President's national security power under present law, which I have always found extremely vague, especially in domestic security threats, as opposed to threats from foreign powers. As I recall, in the recent Katz case, some of the Justices of the Supreme Court doubted that the President has any power at all under the Constitution to engage in tapping and bugging in national security cases without a court order. Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by Title III. As a result of this exchange, I am now sure no President thinks that just because some political movement in this country is giving him fits, he could read this as an agreement from us that, by his own motion, he could put a tap on." (114 Cong. Rec. 14751 [1968].)

This case regrettably discloses that Senator Hart was equipped with a badly clouded crystal ball.

## III. THE PRESIDENT HAS NO INHERENT OR IMPLIED POWERS UNDER THE CONSTITUTION TO TAP WIRES

A. The Foreign Affairs Powers of the Presidency Do Not Extend to the Use Of Warrantless Electronic Eavesdropping In Domestic Matters.

The theory of inherent presidential power in the conduct of foreign affairs defined in United States v. Curtiss-Wright, 299 U.S. 304, 57 S.Ct. 216 (1936), finds no echo in the context of internal matters. At issue there was a criminal statute making it unlawful to ship munitions to South American countries engaged in the Chaco conflict if the President determined that such embargo would promote termination of the conflict. In disposing of the contention that the statute was unconstitutional as an invalid delegation of legislative power to the President, the Court declared that the ground of attack was irrelevant in the field of foreign affairs where the federal government's authority to act was an inherent concomitant of nationality and not derived by delegation from the Constitution, and where the President by virtue of his office enjoyed a plenary and exclusive power "as the sole organ of the federal government . . . a power which does not require as a basis for its exercise an act of Congress. . .

Even if the President may be said to have this plenary and exclusive power to act in the realm of foreign affiairs, the Court was clear that such power did not extend to the Chief Executive's domestic powers:

<sup>&</sup>lt;sup>4</sup>A point not necessary to concede, hence not conceded, by amici

"The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." (299 U.S. 315-316.)

The basis of this distinction is evident and well-founded. Limiting the President's power to the enumerated provisions of the Constitution was fundamental to the belief of the founding fathers that the grant of sovereign power should be distributed among three departments of government. Their purpose was to create a system of checks and balances on the awe-some power that the people of the various states had delegated to the federal government. As Mr. Justice Brandeis noted in his dissent in Myers v. United States, supra:

"The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of governmental powers among these departments, to save the people from autocracy."

There would be no meaning to the constitutional doctrine of separation of powers, and to the Constitution itself, if the President, under color of his power to conduct foreign affairs, could assume powers reserved to the other two branches.

B. The President's Position as Commander In Chief and Chief Executive Does Not Afford A Basis For Circumventing the Fourth Amendment.

It is next contended by the Attorney General that the President's roles as Commander in Chief and Chief Executive confer on him some nebulous, additional authority, which he is free to use outside the Constitution because of an impending internal security crisis. This notion of presidential power has been squarely rejected by this Court in Youngstown, supra. There the Court was confronted with the question whether President Truman's seizure of the steel mills to prevent a "national crisis" could be defended as within the President's inherent power as Chief Executive and Commander in Chief. The Court overwhelmingly concluded that no such power could be found.

Mr. Justice Jackson asserted in Youngstown that while the claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy, prudence has counseled that reliance on such nebulous claims must stop short of provoking a judicial test (343 U.S. at 646-647). The Constitution has made no provision for exercise of extraordinary authority by the Executive in times of internal crisis. Emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who

<sup>&</sup>lt;sup>5</sup>The Attorney General's position requires the inference that the Chief Executive has faced this crisis continually since Franklin Roosevelt's Confidential Memorandum of May 21, 1940 (444 F.2d at 669).

exercises them. This is the safeguard that would be nullified by adoption of the "inherent powers" formula.

The specific grants of authority to the President in Article II of the Constitution will not support the Attorney General's claim that the President has power to ignore the Fourth Amendment. The President's admittedly broad powers as Commander in Chief have not been sufficient to order civilians charged with wartime violations of the laws of the United States to submit to the streamlined processes of a military tribunal rather than the orderly processes of the judicial system. Ex Parte Mulligan, 71 U.S. (4 Wall.) 2 (1866); Duncan v. Kahanamoku, 327 U.S. 304 at 319-324 (1946). By the same reasoning, issuance of an executive warrant which would bypass constitutional judicial process cannot be justified on the basis of the President's war powers.

The Constitution, in making the President the Commander in Chief of the Army and Navy, did not constitute him also Commander in Chief of the country and its inhabitants. The military powers of the President were not intended to supersede representative government in the conduct of internal affairs. The provision of the Constitution authorizing Congress to summon the militia underscores the Constitution's policy that Congress, not the Executive alone, may control utilization of the war power as an instrument of domestic policy.

#### C. The Claimed Power May Not Be Found In Constitutional Provisions Giving the President Executive Power.

Nor may an executive warrant be sustained because of the several constitutional provisions in Article II granting power to the President. The vesting of executive power in the President under section 1 of Article II and that provision of section 3 of Article II directing the President to take care that the laws be faithfully executed do not constitute a grant of the sweeping executive power claimed here.

In In re Neagle, 135 U.S. 1 (1890), the Court held that a United States Marshall who had been assigned by the Attorney General to protect a Supreme Court Justice while on tour of his circuit in California and who killed a man in the course of an attack on the Justice, had performed this act in pursuance of a law of the United States, within the meaning of the federal habeas corpus statute. Neagle was ordered freed from the custody of state officers who had held him on a murder charge.

No federal legislation expressly authorized marshals of the United States to accompany the judges of the Supreme Court through their circuits and act as bodyguards for them. Nevertheless, Neagle was held to be acting in pursuance of a duty under laws of the United States. The Court spoke at length of the power of the President, in discharge of his obligation to take care that the laws be faithfully executed, but equally relied on a provision of the Revised Statutes dealing with the powers of federal marshals and their deputies in executing the laws of the United States.

Myers v. United States, supra, upheld the prerogative of the President in removing, contrary to statute, an officer appointed by the President and serving in the executive department. Speaking for the majority, Chief Justice Taft declared that the opening language of section 1 vesting the executive power in the President was a grant of authority to take appropriate steps with respect to discharge of executive functions. Here was a recognition that section 1 was something more than just a designation of the title of chief executive officer and that it was in itself and undefined grant of executive power.

But the Chief Justice went on to develop the argument that the power of appointment implied a power of removal so that the case could have rested adequately on the theory that the specific grant of certain powers to the President implied incidental powers necessary to their effective execution, just as Congress has the power to enact legislation necessary and proper to effectuate its expressly granted powers.

These decisions establish that the President's constitutional authority is limited to specific grants of power stated in Article II and powers fairly implied therefrom. Despite the language used and the recognition that section 1 of Article II is itself a grant of executive power of undefined dimensions, the decisions viewed on their facts and with respect to the character of the problem presented lend no credence to the idea that the President has the general power to take all steps that he deems appropriate to the welfare and safety of the United Staes. See *In re* 

Debs, 158 U.S. 564 (1895); United States v. Midwest Oil Company, 236 U.S. 459 (1915). On this point, Mr. Justice Black spoke for the Court most forcibly in Youngstown, supra:

"In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States. . . .' After granting many powers to the Congress, Article I goes on to provide that Congress may 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (345 U.S. 579, at 587.)

#### CONCLUSION

The Constitution, by giving the power here claimed by the President to the Judicial Department, denies the power to the Executive Department.

Congress has not purported to vest any such power in the President.

There are no implied or inherent powers incident to the President's executive authority which permit him to engage in warrantless wiretapping, at least in domestic matters.

The decisions of the courts below ought to be

Dated, San Francisco, California, December 15, 1971.

Respectfully submitted,

Benjamin Dreyfus,

Attorney for Black Panther Party,

National Lawyers Guild and National Conference of Black Lawyers as Amici Curiae.

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IN THE

E. ROBERT SEAVER, CLERK

## Supreme Court of the United States

OCTÓBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA,

Petitioner,

-against-

United States District Court for the Eastern District of Michigan, Southern Division, and Honorable Damon, J. Keith,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, AMICI CURIAE

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#### IN THE

### Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA,

Petitioner.

-against-

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, and HONORABLE DAMON J. KEITH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

#### BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, AMICI CURIAE

#### Interest of Amici\*

The American Civil Liberties Union is a nationwide non-partisan organization of over 160,000 members engaged solely in the defense of the Bill of Rights. The American Civil Liberties Union of Michigan is an affiliate of the American Civil Liberties Union and functions within Michigan where this case arose.

<sup>\*</sup>Letters of consent to the filing of this brief have been filed with the Clerk.

During its fifty-one year existence, the ACLU has been particularly concerned with protecting the rights of freedom of expression and privacy, safeguarded by the First and Fourth Amendments to the Constitution. The powers asserted here by the government would gravely impair those essential liberties and would severely undermine "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."

#### Questions Presented

- 1. Does the Attorney General have the constitutional authority to eavesdrop electronically on Americans he considers threatening to domestic security, without being subject to any significant judicial control?
- 2. Should Alderman v. United States, 394 U.S. 165 (1969) be overruled?

#### Constitutional Provision and Statute Involved

The pertinent provisions of the Fourth Amendment and of the Omnibus Crime Control and Safe Streets Act of 1968 appear in the Appendix to the Brief for the United States, and in Appendix A hereto.

#### Summary of Argument

I.

- A. The Government seeks to cast the questions involved herein in unduly narrow terms. According to the Government, this case now\* involves:
- (1) "solely" the absence of prior judicial scrutiny (Govt. Br. 2, 12-13); (2) "a lesser invasion of privacy than a physical search of a man's home or his person" (Govt. Brief 13); and (3) "no novel principle of constitutional law, but rather the application to these facts of existing doctrine" (Govt. Br. 13).
- B. The Government's position obfuscates what is truly at stake: the power to eavesdrop by electronic devices on a huge range of people distrusted by the Attorney General, with virtually no judicial or other scrutiny except sporadically, and then only superficially.
- 1. Judicial review will rarely take place, since this surveillance is allegedly not for criminal prosecution but only for intelligence purposes, and will rarely come to light.
- . 2. When judicial review occurs, the Government would limit it to virtually a rubber stamp.
- 3. The range of people subject to such surveillance under both the congressional standard purportedly relied

The brief on the merits concededly involves "a narrowing of" the question presented by the petition but is allegedly "covered by" it (Govt. Br. 2, n. 1). References to "Govt. Br. —" are to the brief for petitioner. References to "App. —" are to the Appendix to the Petition for Certiorari.

upon by the Government in 18 U.S.C. §2511(3), and as evidenced by past practices, is broad enough to include virtually any critic of the established "structure" of government; the length of time involved in such surveillance is very great; the record shows that this power has not in fact been used sparingly. Indeed, the Government's figures showing a "closely limited" number of surveillances are substantially incorrect in several vital respects.

- 4. Allowing an exemption from constitutional limitations for electronic surveillance justifies similar exemptions for other types of investigative devices and techniques, since there is no rational basis for limiting such an exemption to electronic surveillance.
- C. Granting such a power would seriously encroach not only upon the Fourth Amendment but also upon the First Amendment.
- 1. Electronic surveillance seriously threatens Fourth Amendment values, far more than a conventional search. For this reason, Congress and this Court have required more procedural prerequisites to electronic surveillance than to the conventional search, not fewer as the Government proposes.
- 2. Electronic surveillance seriously threatens First-Amendment values and interests, particularly when employed against political dissidents, as it so often has been.
- D. There is no justification in law or in reason for granting the Attorney General such dangerous power over the lives and thoughts of Americans.

- 1. There is no judicial precedent for such powers in the area of domestic "threats"; indeed, this Court has expressly denied the Executive such power. Decisions in the field of foreign affairs are not germane; the Congress and the Attorney General have both recognized the difference between the two spheres.
- 2. Congress has not authorized such a power in 18 U.S.C. §2511(3).
- 3. Executive memoranda are neither controlling nor even pertinent, since they were based on different problems in different settings.
- 4. Sound policy counsels against the grant of such power.
- a. A vague and talesmanic invocation of "national security" should not suffice to impair the fundamental values incorporated in the First and Fourth Amendments.
- b. No showing has been made that the judiciary is either too incompetent or too unreliable to screen such surveillances, or that the Attorney General is uniquely so qualified.
- c. The benefits of "uniformity" and "centralization" are unproven and dubious.

#### П.

- A. Alderman v. United States, 394 U.S. 165 (1969), is sound law and nothing that has occurred since that decision justifies modifying it in any way.
- B. Alderman is based on the Fourth Amendment and not on this Court's non-constitutional supervisory power.

#### ARGUMENT

#### Introduction

Almost 100 years ago, Mr. Justice Miller wrote: "No man is so high that he is above the law . . . All officers of the government . . are creatures of the law and are bound to obey it." United States v. Lee, 106 U.S. 196, 220 (1882). In recent years, the rule of law has been tested as never before. The nation is still torn by bitter dissension over a war that has cost us much blood, treasure and domestic tranquility; blacks, Mexican-Americans, Puerto Ricans and others have been embittered by long years of oppression; many of our young people remain, alienated and disaffected; unemployment remains high.

At such times, the rule of law becomes both more vital and more vulnerable. The temptation to override it, particularly among the powerful, is often irresistible, as the Alien and Sedition Acts, McCarthyism, and the Palmer raids so tragically demonstrate; the temptation among the disaffected to ignore it is equally great.

This case brings before this Court one of the most serious challenges to the rule of law from the governmental side: an attempt by the Executive Branch and the Attorney General to invade free speech, association, and privacy by electronic spying, solely upon the Attorney General's secret subjective judgment that it is "not unreasonable" to do so, and without permitting any outside check on that judgment.

This demand has few, if any, parallels in our history. Ignoring\_our traditions of checks and balances, limited delegated powers, and clear Fourth and First Amendment

restraints, the Government demands the right to apply the most penetrating and unlimited electronic spying devices on all individuals and groups who, in the Attorney General's eyes, appear "dangerous." No nation can survive such a power and remain free; no democracy can function where dissent and free association are so jeopardized; no society can allow the Executive so gross an exemption from "those wise restraints that make men free" without teaching its people that the mandate of the rule of law runs in one direction only.

#### I.

The Government claims the right to eavesdrop electronically on political dissenters without any external scrutiny or other meaningful controls.

## A. The Government's Statement Minimizes the Issues Herein.

In its petition for certiorari, the Government submitted the following question for review by this Court:

"Whether electronic surveillance is reasonable within the meaning of the Fourth Amendment when it has been specifically authorized by the President, acting through the Attorney General, to gather intelligence information deemed necessary to protect against attempts to overthrow the government by force or other unlawful means or against other clear and present dangers to the government's structure or existence." (Petition 2.)

In its brief on the merits, the Government has restated its position much less sweepingly, though claiming merely

a "narrowing of the question." Asserting that electronic surveillance involves a "lesser invasion of privacy than a physical search of a man's home or his person," (Govt. Br. 13; emphasis added), the Government frames the issue as if it involved only another application of the principle that some searches need not be preceded by a warrant. Thus, concludes the Government, "this case . . . involves no novel principle of constitutional law but rather the application to these facts of existing doctrine." (Ibid.)

The Government deserves an A for effort, but an I for correctness. Its attempt to reduce a mountain to a molehill is defeated by the most obvious facts about electronic eavesdropping and by the virtually absolute exemption from judicial or other scrutiny that the Government seeks. Judge Edwards wrote of the Government's contention below, "the sweep of the assertion of the Presidential power is both eloquent and breathtaking." App. 19. The claim here is no less sweeping.

#### B. The Court of Appeals Correctly Analyzed the Enormous Scope and Impact of the Government's Claim.

The backbone of the Government's argument is that the reasonableness of a search depends on "a weighing of the competing interests involved" (Govt. Br. 11) and that "in balancing the competing interests involved . . . the overhearing of a telephone conversation . . . involves a lesser invasion of privacy than a physical search of a man's home or his person" (Govt. Br. 13). If the Government has weighed some of the factors wrongly, then the equation supporting its argument collapses.

<sup>•</sup> Indeed, the Court of Appeals agreed to consider the case of the merits because "great issues are at stake for all parties concerned." App. 15:

And the Government has weighed wrongly, tragically so. Indeed, it is appalling to have it demonstrated so clearly how little weight the Government attaches to privacy and all that it means for a free society.

Apart from the fact that the typical electronic surveillance involves not merely "a telephone conversation" (regardless of who the defendant is) but many thousands,\* electronic surveillance is generally acknowledged to be one of the most dangerous and intrusive threats to privacy. It is the prime example of Mr. Justice Brandeis' forebodings in Olmstead v. United States, 277 U.S. 438, 473 (1928) that "discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." Even where circumscribed within the confines of 18 U.S.C. §2500 et seq., it represents an intensive and extensive invasion of private speech and thought with almost no parallel. When a continuous tap is placed on a telephone, the eavesdropper almost inevitably hears all the conversations of everyone who talks on that line whether the subject calls out from the tapped number, calls in to that number, or is called by someone using that phone, and no matter how irrelevant or privileged the communication. A room microphone is even more intrusive, for it can catch every intimate, irrelevant, or privileged utterance of each person in the room or area bugged, whether it be the bedroom, see Irvine v. California, 347 U.S. 128 (1954), or the office, Goldman v.

<sup>\*</sup>See, e.g., Report of the Administrative Office of the United States Court of Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications for the Period January 1, 1970 to December 31, 1970, Table 4 (1971) (average number of conversations overheard per federal intercept was 821).

United States, 315 U.S. 129 (1942) or a public telephone. Because these devices intrude so deeply and so grossly, they discourage people from speaking freely; as Mr. Justice Brennan has warned, if these devices proliferate widely, we may find ourselves in a society where the only sure way to guard one's privacy "is to keep one's mouth shut on all occasions." Lopez v. United States, 373 U.S. 427, 450 (1963).

This is why this Court said in Berger v. New York, 388. U.S. 41, 63 (1967), "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." See also id. at 56, 68, 69. This is why Congress limited the right to eavesdrop electronically so much more than it limited conventional searches. Indeed, the whole elaborate panoply of 18 U.S.C. §2500 et seq. is a recognition of the uniquely dangerous nature of electronic surveillance. Thus, for example, no warrant may be issued for electronic surveillance unless the Court is convinced that no other practical means exist to obtain the necessary information, 18 U.S.C. §2518(1)(c), a requirement not imposed for more conventional searches.

#### C. The Government Seeks to Avoid Any Judicial or Other Check on Its Electronic Surveillance.

#### 1. National security surveillance will rarely be revealed.

Even if the weight assigned by the Government to the effect of electronic surveillance were correct, the freedom from restraint sought by the Government goes far beyond that constitutionally permitted for a conventional search. For the issue is not merely the point in time at which the Government must obtain a warrant, but whether it

must do so at all. The Government is not seeking merely to avoid the necessity of having to obtain a warrant before it taps or bugs, as in Carroll v. United States, 267 U.S. 132, Schmerber v. California, 384 U.S. 757, or Warden v. Hayden, 387 U.S. 294, but rather to avoid any judicial oversight whatsoever.

Unless the Government is required to get a warrant in advance or shortly thereafter, compare the "emergency" provision, 18 U.S.C. §2518(7), its eavesdropping will rarely ever be scrutinized by a court. Unlike a conventional search which will inevitably be disclosed immediately, electronic surveillance is surreptitious and will rarely come to light unless voluntarily or accidentally revealed in an occasional criminal prosecution (Govt. Br. 21). Since national security surveillance is used primarily for intelligence and not for prosecution, there is little likelihood indeed that it will ever come to light. Thus, whereas the kinds of searches involved in e.g., Carroll, Schmerber and Warden v. Hayden, will ultimately be subject to some check, as will the electronic surveillance pursuant to court order, the national security surveillance almost never will be.

It can be seen that the statutory scheme is one of absolute secrecy for national security wiretaps, limited secrecy for authorized wiretaps, and no secrecy permitted for banned private wiretaps.

The point was made very clearly by the Government in the Government's Reply Memorandum of Law in Support of Its Motion to Dismiss the Amended Complaint (dated 5/18/71), pp. 7-8, in Kinoy v. Mitchell, 70 Civ. 5698, S.D.N.Y., where it described the electronic surveillance encompassed by 18 U.S.C. §2500 et seq., including §2511(3) as follows:

The very first words [of §2511(3)] clearly exempt national security wiretaps from the necessity for connection with the specific crimes listed in Section 2516, from the specificity, probable cause, and duration limitations of Section 2518, from the inventory provision of 2518(8)(d) and indeed from court supervision other than when offered in a criminal prosecution.

 Even where the national security surveillance does come to light in a criminal prosecution, the Government would make the judiciary virtually a rubber stamp.

Repeatedly stressing the alleged incompetence of the judiciary to review "the judgment involved in determining whether to authorize a particular surveillance" (Govt. Br. 22, 24-26, 33), the merits of which assertion will be discussed below, the Government would limit judicial review to determine whether

"the determination that the proposed surveillance relates to a national security matter is arbitrary and capricious. . . . The Court should not substitute its judgment for that of the Attorney General on whether the particular organization, person or events involved has a sufficient nexus to protection of the national security to justify the surveillance" (id. at 22).

The court may thus look only to whether national security is somehow involved and under the least demanding of standards. It may not even consider whether the particular person whose privacy is affected is entitled to be free from such privacy. Indeed, given the Government's distrust of judicial competence in this area, it is difficult to see how the courts can apply even so loose a standard as "arbitrary and capricious."

#### 3. Congressional supervision is equally limited.

Nor is Congress given any greater role. There is no provision for any formal oversight and the Government has done nothing to facilitate any kind of systematic congressional oversight of the "reasonableness" of such surveillance.

- D. The Range of Possible Targets of Such Surveillance Is Virtually Unlimited, and the Amount of Such Surveillance Far Exceeds That Conceded in the Government's Brief.
- The range of possible targets of such surveillance is virtually unlimited.

Not only does the Government claim the right to be free from virtually all judicial limitations, but it acknowledges no limitation on who may be eavesdropped upon.

In the first place, we are given little or no indication of what kinds of persons or organizations may be the targets of such eavesdropping. The affidavit in this case, for example, says only that the surveillance is

"being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government" (Govt. Br. 3).

Interestingly enough, there is no reference to violence here, despite the many casual references in the Government's brief to "sabotage," id. at 18 "actual acts of insurrection" (id. at 15), "protection of the fabric of society itself" (id. at 14), "threats to overthrow," (id. at 17), and bombings (id. at 18).

The Government relies on the language of §2511(3) which refers to those who would "overthrow the government by force or other unlawful means or against any other clear and present danger to the structure or existence of the government."

Such a class is frighteningly indefinite. By its own terms, it goes beyond those who would engage in unlawful activity and includes all who seek major changes in the "structure

center. Taken literally, this can include those who would change the Electoral College system or would reverse the Supreme Court's apportionment or segregation decisions. As Mr. Justice White said of a similarly broad attute in Baggett v. Bullitt, 377 C.S. 360, 373 (1964):

"The State labels as wholly fanciful the suggested possible coverage of the two oaths. It may well be correct, but the contention only emphasizes the difficulties with the two statutes; for if the oaths do not reach some or any of the behavior suggested, which specific conduct do the oaths cover? Where does fanciful possibility end and intended coverage begin!

"It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions... Well-intended prosecutors and judicial safeguards do not neutralize the vice of a vague law." (Emphasis added.)

The breadth of the category has been noted by one of the leading experts in this field, who was the chief architect of 18 U.S.C. §2500 et seq., G. Robert Blakey, Chief Counsel, Subcommittee on Criminal Laws and Procedures, in a Memorandum to Senator John McClellan, reprinted in 117 Cong. Rec. S6479 (May 10, 1971 daily ed.). Under the heading "Definitions of Key Terms," he included inter alia, "La Cosa Nostra," and added that such surveillance is "sometimes used to determine the influence of extremist groups in other legitimate organizations (civil rights or peace)." The prime example of the latter is of course the wiretapping of

Martin Luther King, Jr., which was apparently undertaken for fear of Communist influence on Dr. King. See Navasky, Kennedy Justice 135-55 (1971).

The likelihood of such widespread surveillance has been confirmed many times. Martin Luther King, Jr. and Elijah Muhammed are but two of those whom the Government has admitted spying upon under this power. There are widespread revelations of military spying on those who have attended anti-war 'rallies, demonstrations, and the like, some of which was "at the request of the Justice Department," according to Assistant Secretary of Defense Daniel Z. Henkin on national television. Buffalo Evening News, December 1, 1970, p. 1, col. 1. Reports of outrageous syping of people not liked by the F.B.I. and/or the Attorney General in earlier years are numerous. See Theoharis and Meyer, The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception, 14 Wayne L. Rev. 749, 760-61 (1968) (Mrs. Roosevelt, John L. Lewis, Bureau of Standards Director Edward Condon, etc.).

Because of the secrecy of these surveillances, it is impossible to know just how far into ordinary political activity they extend—the revelations with respect to Martin Luther King, Jr. and of military spying in Illinois and elsewhere are hardly reassuring. But the vagueness of this category permits this 1984-type spying on a huge range of people.

Even if the kinds of persons or organizations covered by the Government's conception of threats to "national security" were clearer, the number of totally innocent people that would be overheard would still be huge. This surveillance is allegedly for intelligence purposes, not for investigation of specific criminal conduct. According to Mr. Blakey, intelligence investigations are intended to monitor both criminal and non-criminal associates of suspected persons or organizations, and criminal and non-criminal activities. In his memorandum to Senator McClellan, Mr. Blakey noted:

"Note, too, that since the emphasis is on the prevention of harmful activity rather than the punishment of those who have already caused harm, police action in these areas tends to cover more people for longer periods of time under less precise standards than conventional criminal investigation." 117 Cong. Rec. S6477 (May 10, 1971 daily ed.). See H. Schwartz, The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order," 67 Mich. L. Rev. 455, 468-71 (1969).

It is perhaps in recognition of this, that the Government strongly opposes any effort by the courts to review the Attorney General's determination that "the particular-organization, person or event has a sufficient nexus to protection of the national security to justify the surveillance" (Govt. Br. 22).

# 2. The extent of national security surveillance is greater than that conceded by the Government's Brief.

In order to support its contention that the Attorney General can be trusted to make such delicate determinations, the Government stresses that:

The Attorney General personalls authorizes each national security surveillance, and does so only when he concludes that the information to be obtained

thereby is essential to the protection of the government. One result of this careful and personal review by the Attorney General is that the number of such surveillances is closely limited; indeed, in recent years it has significantly declined. The number of warrantless "national security" telephone surveillances operated by the Federal Bureau of Investigation in the past ten years has decreased: 1960-78; 1961-90; 1962-84; 1963-95; 1964-64; 1965-44; 1966-32; 1967-38; 1968-33; 1969-49; 1970-36. See, e.g., Hearings before a Subcommittee of the Committee on Appropriations of the House of Representatives, 87th Cong., 2d Sess. 345 (January 22, 1962); Hearings before a Subcommittee of the Committee on Appropriations of the House of Representatives, 88th Cong., 1st Sess. 491 (January 29, 1963); Hearings before a Subcommittee of the Committee on Appropriations of the House of Representatives, 91st Cong., 2d Sess. 754 (February 17, 1970).

These statistics are both inaccurate and misleading in at least three respects.

1. These figures seem to state the total number of such surveillances for the year. In fact, they do not, but only the total number of telephone surveillances in operation as of a particular date, generally the date of FBI Director J. Edgar Hoover's testimony. The point was made very clearly in the Government's brief in the court below where it described these same figures as "the steadily decreasing number of warrantless 'national security' telephone surveillances operated by the Federal Bureau of Investigation at the time of the Congressional hearings or appropria-

tions in each of the past ten years. . . . " Supp. Memorandum for Petitioner, p. 10, n. 3 at p. 11. The actual totals appear in subpara. 3 below.

- 2. These figures apply only to telephone surveillances, which the Government here also seeks to have authorized. Very few figures for the microphone surveillances have been made available, but at some periods, they were not much fewer than telephone taps. For example, on May 25, 1961, Assistant Attorney General Herbert J. Miller, Jr. wrote Senator Ervin that on February 8, 1960 there were 78 telephone taps in operation and that "The Federal Bureau of Investigation has 67 of these [electronic listening] devices in operation," apparently on May 25, 1971, the date of the letter. The letter is reprinted in Navasky, Kennedy Justice 88 (1971).
- 3. The actual number of taps and bugs for recent years, i.e., June-December 1968, calendar year 1969 and calendar year 1970 and the highest number in operation at any one time during those years appears in correspondence between Senator Edward M. Kennedy and the Department of Justice, released on December 17, 1971 and reprinted in Appendix B hereto. That correspondence contains the following information:

"June 19 to December 31, 1968.

Telephone Surveillances

In operation less than one week. In operation 1 week to 1 month In operation 1 to 6 months In operation more than 6 months

TOTAL

#### Microphone Surveillances

In operation less than one week In operation 1 week to 1 month In operation 1 to 6 months In operation more than 6 months

TOTAL

Calendar Year 1969

Telephone Surveillances

In operation less than one week
In operation 1 week to 1 month
In operation 1 to 6 months
In operation more than 6 months

TOTAL

Microphone Surveillances

In operation less than one week In operation 1 week to 1 month In operation 1 to 6 months In operation more than 6 months

TOTAL

Calendar Year 1970

Telephone Surveillances

In operation less than one week In operation 1 week to 1 month In operation 1 to 6 months In operation more than 6 months

TOTAL

0

21.

13

97

#### Microphone Surveillances

In operation less than one week In operation 1 week to 1 month In operation 1 to 6 months In operation more than 6 months

#### TOTAL

16

45

59

The annual totals set forth above can be misleading in that they reflect the total installations authorized or in place during the periods described. The total maximum number of surveillances in operation at any one time during the periods described are as follows:

#### June 19 to December 31, 1968

Telephone Surveillances Microphone Surveillances

#### Calendar Year 1969

Telephone Surveillances
Microphone Surveillances

#### Calendar Year 1970

Telephone Surveillances Microphone Surveillances 56

Letter of March 1, 1971 from Asst. Atty. Genl. Robert C. Mardian to Senator Edward M. Kennedy.

Assistant Attorney General Mardian refused to break these down into foreign and domestic surveillances. Letter of April 23, 1971, in Appendix hereto. It should be noted that in 1969 and 1970, the Attorney General had installed but 30 court-ordered electronic surveillances in 1969 and 180 in 1970. See 1969 and 1970 Reports of the Administrative Office of the United States Courts on court-ordered electronic surveillances. Obviously, there has been a great

deal of such national security eavesdropping, and the privacy of vast numbers of people has been invaded.

E. If This Exemption From Constitutional Restrictions Is Granted, There Is No Rational Basis for Not Granting a Similar Exemption From Other Constitutional Protections.

The Government's argument for dispensing with conventional constitutional protections deals only with electronic. eavesdropping. But can such an exemption be limited to electronic surveillance or investigation? How can it not logically extend to other forms of obtaining intelligence such as entering and searching a person's or group's home, office or desk without a judicial warrant? See Gouled v. United States, 255 U.S. 298 (1921); Coolidge v. New Hampshire, 403 U.S. 443 (1971). Why does it not also include detention for investigation of groups or individuals? detention or arrest in order to remove a person or organiration from circulation? See Korematsu v. United States. 323 U.S. 214 (1944). Or, taking property forcibly from a "dangerous" person or group! See Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). And in all these \* cases, without permitting judicial review of whether the "particular organization, person or event has a sufficient nexus to protection of the national security to justify the" official action. By what rationale can these be distinguished from the activities defended here by the Government?

These then constitute the true dimensions of the Government's position—a demand for a vast, lengthy unsupervised and unchecked invasion of the privacy (and implicitly, other rights) of many, many people having only the remotest link with anything in any way criminal or even. wrong.

II.

The Government's demand is inconsistent with the Fourth and First Amendments.

# A. The Government's Demand Is Inconsistent With the Fourth Amendment.

The most recent utterance of this Court on the warrant requirement speaks directly to the issue at hand. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), this Court found unacceptable a search based solely on an authorization by "the chief 'governmental enforcement agent' of the State—the Attorney General..." 403 U.S. at 450. The Court squarely rejected a claim that the Attorney General "did in fact act as a 'neutral and detached magistrate,' "ibid., a claim similar to that presented here (Govt. Br. 19-28). And in rejecting the other justifications proposed by the State of New Hampshire for dispensing with a warrant, Mr. Justice Stewart said for the Court, in words directly applicable to this case:

"the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-deline ated 'exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption'. . . that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.' In times of unrest, whether caused by crime or racial conflict or fear of internal subversion;

appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." 403 U.S. at 454-55 (footnotes omitted, emphasis added).

The Government merely cites Coolinge once in passing, Govt. Br. 19 n. 8, and instead relies on two lines of authority for its claim that it is exempt from the warrant and other Fourth Amendment requirements: (1) in part, the Government relies on the Court's reservation of the national security situation and on Mr. Justice White's concurrence in Katz v. United States, 389 U.S. 347; 358 n. 23, and 363-64 (1967), a case that reaffirmed the warrant requirement in other respects; (2) in part, the Government relies on cases in other situations such as border searches, entry into government buildings, welfare, and immigration (Govt. Br. 12), as well as certain other law enforcement situations. (Id. at 12 n. 3.) Neither offers the Government much support.

The reservation of the question of warrantless surveillance by Mr. Justice Stewart in his Katz opinion for the Court, 389 U.S. at 358 n. 23, and his concurrence in Giordano v. United States, 394 U.S. 310, 314-15 (1969), which

refers to Mr. Justice White's concurrence in Katz and in Berger, 388 U.S. at 112-18, all make it clear that both he and probably Mr. Justice White, were referring solely to foreign affairs eavesdropping, not domestic. For the view that there is no exemption even in foreign matters, see Douglas J., concurring in Katz, 389 U.S. at 359-60.

The distinction between the two areas will be discussed at pp. 32-33 below.

Cases from other situations offer the Government little more. A customs search is an historically sanctioned exception, that has increasingly come under fire. See gengenerally Comment, Border Searches and the Fourth Amendment, 77 Yale L.J. 1007 (1967). Searches of persons occasionally entering government buildings are a far cry from intensive and lengthy electronic eavesdropping of someone in his own home or office. Welfare searches without a warrant were justified in Wyman v. James, 400 U.S. 309, 318-24 (1970) on the ground that the community had a right to know whether the beneficiaries of public funds were spending those funds in accordance with community intentions, especially where children are involved In Camara v. Municipal Court, 387 U.S. 523 (1967), a warrant from a reutral magistrate was insisted upon. And immigration matters have always been sui generis, since aliens have always had fewer rights than citizens. See opinion below, App. 22-23. It should also be noted that in Abel v. United States, 362 U.S. 217 (1960), the issue of whether a warrant was necessary and what kind, was explicitly reserved by the court. See 362 U.S. at 230, 236.

As to other types of warrantless searches authorized by Chambers v. Maroney, 399 U.S. 342 (1970); Schmerber,

i. California, 384 U.S. 757 (1966); Terry/v. Ohio, 392 U.S. 1 (1968); Warden v. Hayden, 387, U.S. 294 (1967)—all these involve special circumstances based on speed, e.g., Behmerber, Chambers, Warden, or immediate self-protection. Compare Terry with Sibron v. New York, 392 U.S. 46 (1968), (no threat and therefore no right to frisk). No such exigency is present here. See opinion below, App. 23. Moreover, in each instance, judicial scrutiny after the fact was always available. Here, however, because of the secrecy of the search and the fact that it will rarely come to light, no judicial or other scrutiny is ever likely.

#### B. The Distinction Between Surveillance for Intelligence and Surveillance for Criminal Prosecution Is Immaterial.

The Government makes much of a purported distinction between searches for intelligence and those for law enforcement and prosecution. Indeed, its whole argument depends on that distinction (Govt. Br. 16). But nowhere! in the Constitution or in case law is there any justification for such a distinction. Totten v. United States, 92 U.S. 105, 106 (1875) dealt with the powers of the Commander-in-Chief in wartime to "employ secret agents, a far cry from the President's power in peacetime to encroach upon the most fundamental rights of a free society. Indeed, in many of these cases, intelligence and prosecution merge and the only point of the distinction is that noted in the oral argument in United States v. Donghi, Cr. 1970-81 (W.D. N.Y.) petition for mandamus pending: when the Government can meet the probable cause requirement, it gets a warrant, and when it cannot, it relies on the so-called intelligence-gathering power. See Govt. Br. 23, urging rejection of probable cause standard for such activity.

Indeed, surveillance for intelligence purposes is even more destructive of the values of a free society than surveillance for criminal prosecution. Intelligence surveillance is an explicit fishing expedition of the 1984 variety. It intrudes upon those suspected of no wrongdoing whatsoever, see H. Schwartz, 67 Mich. L. Rev. at 468-71, and spreads an aura of Big Brotherism that no free society can tolerate. When joined with a demand for the power to engage in such intelligence surveillance without any significant outside check, the clash with individual liberty becomes intolerable.

#### C. The Government's Demand Is Inconsistent With Freedom of Speech and Association Protected by the First Amendment.

Not only does the Government assign too slight a weight to "the invasion which the search entails" insofar as Fourth Amendment values are concerned, but it completely omits any reference to the First Amendment values that are threatened by such surveillance. As Judge Edwards noted for the court below, App. 36-37, and as Mr. Justice Brennan demonstrated in Marcus v. Search Warrant, 367 U.S. 717, 724-29 (1961), the historical link between arbitrary searches and free speech is a close one. Since as early as 1557, not long after the invention of printing, governments have continually sought to spy upon and suppress "dangerous" speech and associations and to search out "dangerous individuals and groups." Entick v. Carrington, 19 How. St. Tr. 1029, "one of the landmarks of English liberty," 367 U.S. at 728, is one of the most significant incidents in this history, and it has many parallels in colonial history, where the hated writs of assistance gave birth to the Fourth

Amendment. Of Entick, the Court said in Boyd v. United States, 116 U.S. 616, 627-30:

"The principles laid down in this opinion... apply to all invasions on the part of the Government and its employes of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence..." 116 U.S. 627-30.

Mere recently, in Stanford v. Texas, 379 U.S. 476, 485 (1965), the Court ruled that where First Amendment considerations were involved, the Fourth Amendment requirements are more stringent.

Involuntary disclosure of membership lists and other associational information can also be fatal to the equally important and related right of association, as the Supreme Court pointed out in NAACP v. Alabama, 357 U.S. 449 (1958).

Electronic eavesdropping, particularly of the kind sought to be here legitimated, would seriously interfere with both speech and association, as the Court below found, App. 36-37, and far more than any conventional search or disclosure. Such electronic surveillance usually operates to chill free discourse and association by denying the sense of confidentiality and security that is absolutely indispensable to such discourse and association—how many will divulge a confidence critical of those in power if they know

they may be overheard? As Mr. Justice Brennan said in Lopez, the only way to guard privacy is "to keep one's mouth shut an all occasions" 373 U.S. at 450.

Moreover, the very publicity given to this policy, as well as the disclosure of specific applications thereof to dissenters, will chill free discourse and association even more. Although these disclosures are of course necessary to a free society and a fair trial, the many public statements by the Government are not. See, e.g., U.S. To Tighten Surveillance of Radicals, N.Y. Times, April 12, 1970, §1, p. 1. col. 2; F.B.I. Seeks Panther Data, N.Y. Times, Dec. 14. 1969, §1, p. 1, col. 2. The many revelations as to who has been eavesdropped upon, some of which were discussed above, the broad scope of who is subject to such eavesdropping under the Government's claim, the enormous amount of eavesdropping that has gone on despite denials thereof, see, e.g., Hearings Before the Senate Subcommittee on Administrative Practices and Procedures on Invasions of Privacy by Governmental Agencies (1965-66); see generally, H. Schwartz, The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order" 67 Mich. L. Rev. 455, 477-80 (1969), and the fact that taps and bugs are concededly installed on non-criminal associates and on non-criminal activities, see H. Schwartz, id. at 469 n. 65, 470 N. 68 (testimony of F.B.I. agents) - all these factors combine to make it very dangerous indeed to risk associating with or even speaking on the phone or in a home or office to someone who may be considered "danger-

<sup>\*</sup> See the awareness of this in an F.B.I. newsletter of September 16, 1970, reproduced in Donner, Spying for the F.B.I., New York Review of Books, April 22, 1971, p. 31, and the intent to capitalize thereon to discourage free speech and association.

ous" by the Attorney General. As Mr. Justice Brandeis said in Olmstead v. United States, 277 U.S. 438, 478 (1928), "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping."

#### ш.

There is no justification for granting the Attorney General such vast unchecked powers over the lives and liberties of the American people.

A. The Government's Argument Here Is Actually the Same Argument for Inherent Powers Presented and Rejected Below; the President's Power Over Foreign Affairs Offers No Support for Its Claim.

Although the Government seeks to cast its argument in traditional Fourth Amendment language, in the last analysis its argument is really a disguised version of its argument for inherent powers pressed so vigorously and extensively below. See Govt. Br. 15-18, 31-33. Since the Government has apparently chosen to abandon this claim, there would ordinarily be no need to do more than to point to the thorough demolition of such an argument by the court below. App. 19-26.

The Government nevertheless draws on such an argument here in relying on the foreign affairs power to justify the surveillance power asserted here (Govt. Br. 29-34). Urging that no distinction can be drawn between "domestic" and "foreign" surveillance, the Government cites the con-

<sup>•</sup> For the views of constitutional law experts on the power claimed here, see Appendix C to this brief.

tents of a sealed exhibit filed in Ferguson v. United States, No. 71-239. Govt. Br. 30 n. 13.

In the first place, it is difficult to argue the significance of records that respondents and Amici have never been allowed to see. The Government's characterization of such calls is obviously impossible for respondents and Amici to dispute, as is the significance ascribed by the Government to such characterization.

Secondly, and without passing on whether there is an exception for such surveillance for foreign-related activities. the difference between the President's powers in foreign affairs and in domestic matters is clear and long-established, as Mr. Justice Jackson stressed in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 643-44, 646 (1952). There he observed in passing that United States v. Curtiss-Wright Corp., 299 U.S. 304 "recognized internal and external affairs as different," where inherent executive power is claimed. 635-36 n. 2. The same point is made quite decisively in Chicago & Southern Air Lines, Inc. v. Waterman, 333 U.S. 103 (1948), where the Court stressed that "the very nature of executive decisions as to foreign policy is political, not judicial;" 333 U.S. at 111 (emphasis added). Indeed, the Court in Waterman expressly distinguished the President's limited power over domestic air routes from his plenary powers over foreign routes or. carriers, for the very reasons set out above. Id. at 109-10.

Neither time nor space permits detailing the irrelevance of such of the many decisions cited by the Government. This was carefully done by Judge Edwards below at App. 21-22. See also P. Kauper, The Steel Seizure Case: Congress and the Supreme Court, 51 Mich. L. Rev. 141, 149-50 (1952).

Other courts have come to the same conclusion: we cannot treat our own people like foreign enemies. See, e.g., United States v. Smith, 321 F. Supp. 424 (C.D. Calif. 1971), petition for cert. pending.

As Judge Keith said in the district court decision herein:

"An idea which seems to permeate much of the Government's argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes at the very constitutional privileges and immunities that are inherent in United States citizenship. It is to be remembered that in our democracy all men are to receive equal justice regardless of their political beliefs or persuasions. The executive branch of our government cannot be given the power or the opportunity to investigate and prosecute criminal violations under two different standards simply because certain accused persons espouse views which are inconsistent with our present form of government.

"In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our existing form of government. If democracy as we know it, and as our fore-fathers established it, is to stand, then 'attempts of domestic organizations to attack and subvert the existing structure of the Government' (see affidavit of Attorney General), cannot be, in and of themselves, a crime. Such attempts become criminal only where it

can be shown that activity was/is carried on through unlawful means, such as the invasion of the rights of others by use of force or violence." App. 71.

See also Jackson, J., concurring in Youngstown, 343 U.S. at 649-54.

Moreover, the distinction between foreign and domestic surveillance has been drawn steadily by the Government itself in its own affidavits. In the case at bar as well as in the Chicago conspiracy case, United States v. Dellinger, et al., Orim. 69-18, N.D. Ill., decided Feb. 20, 1970, for example, the Attorney General's affidavits expressly referred to "domestic security." In the Jewish Defense League case, United States v. Bieber, Crim. 71-479 (E.D.N.Y.), and in United States v. Clay, 430 F.2d 165 (5th Cir. 1970), rev'd on another issue, 403 U.S. 698 (1971), the affidavits spoke of "foreign" problems. And as the Government implicitly concedes, §2511(3) seems to draw such a distinction. Why then is it so unreal?

The distinction was apparently easy enough to draw for the distinguished and experienced lawyers who constituted the members of the American Bar Association Minimum Standards Committee on Electronic Surveillance and the ABA House of Delegates. The ABA Minimum Standards for Electronic Surveillance adopted by that body February 1971 do not include the power sought by the Government herein to eavesdrop on domestic security, despite the explicit intent to track the federal statute very closely. See Introduction to Standards, p. 1. The right to dispense with judicial authorization approved by these standards in national security cases relates solely to foreign matters, see §3.1, and even this authority was sharply challenged. See 8 CrL 2371-72 (2-17-71).

In floor debate, Mr. Justice Powell, then a private citizen and a member of the Special Committee on Standards for the Administration of Criminal Justice that recommended these Standards, expressly stated that the exemption from antecedent judicial scrutiny does not apply to domestic subversion, but only to foreign attack. 8 CrL 2372.

This deliberate omission of the power to eavesdrop on domestic individuals and groups indicates that the ABA House of Delegates believes that the President should not have such authority. This omission is particularly significant in light of the relatively sympathetic attitude toward governmental eavesdropping reflected in the Standards and Commentary, both in the final version and in the Tentative Draft of June, 1968.

There are some fundamental reasons for the distinction. Domestic individuals and groups owe this nation loyalty and allegiance, in return for which they are entitled to the full measure of liberty that constituted the raison d'être for this nation's creation. A foreign group or national neither owes this nation that allegiance, nor are they usually given the full benefit of the nation's bounty.

Moreover, much of the eavesdropping in the international area probably has little to do with threats to this nation, but is designed more to provide data for informal policymaking than to counter dangerous attack.

Indeed, even for foreign enemies, we have statutes and due process, and any electronic eavesdropping for such purposes must comply with the detailed structure of 18 U.S.C. §2500. See 18 U.S.C. §2511(2). Only where we deal with the non-criminal array of foreign policy activities—

and inevitably, most foreign policy activities do not involve criminal implications—can even a colorable case be made for some kind of intelligence oriented surveillance. Where domestic activities involving potential law-breaking are concerned, the Constitution must be observed.

#### B. There Is No Statutory Authority for This Power.

In the first place, as the court below concluded, App. 28-33, Congress gave no statutory authority to exercise such surveillance, even if it constitutionally could do so. Section 2511(3) of the Act merely reads:

"Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means or against any other clear and present danger to the structure or existence of the Government..."

The Senate Report at one point refers to this power as if it encompassed only foreign-related activities, see S. Rep. No. 1097, 90th Cong., 2d Sess. 69 (1968), although the detailed analysis of the report is more ambiguous. *Id.* at 94. See discussion at pp. 36-37 below. But on the floor of the Senate, it was made clear in response to Senator Hart that no extraordinary additional powers were given or even acknowledged:

"Mr. Holland . . . We are not affirmatively conferring any power upon the President. We are simply saying that nothing herein shall limit such powers as the President has under the Constitution. If he does not have the power to do any specific thing, we need not be concerned. We certainly do not grant him a thing. There is nothing affirmative in this statement." 118 Cong. Rec. 14751 (May 23, 1968) (emphasis added).

## And Senator Hart thereupon concluded:

"A few days ago I wondered whether we thought that we nonetheless could do something about the Constitution. However, we are agreed that this language should not be regarded as intending to grant any authority, including authority to put a bug on, that the President does not have now.

In addition, Mr. President, as I think our exchange makes clear, nothing in section 2511(3) even attempts to define the limits of the President's national security powers under present law, which I have always found extremely vague, especially in domestic security threats, as opposed to threats from foreign powers. As I recall, in the recent Katz case, some of the Justices of the Supreme Court doubted that the President has any power at all under the Constitution to engage in tapping and bugging in national security cases without a court order. Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by title III. As a result of this exchange, I am now sure no President thinks that just because some political movement in this country is giving him fits, he could read this as an agreement from us that by his own motion, he could put a tap on." (Emphasis added.) Ibid.

More recently, Senator McClellan, perhaps the prime mover behind 18 U.S.C. §2500 et seq. expressed virtually

the same position. In presenting the report of the Administrative Office of the United States Courts on the 1970 court-ordered electronic surveillances he declared with respect to "the so-called national security or domestic security use of wiretaps or listening devices," and the President's power thereon:

"What the scope of the President's constitutional powers is in this area is a question the Congress did not reach in 1968, and which is, I note, now in the lower Federal courts winding its way up to the Supreme Court. See *United States* v. Keith, No. 71-1105 U.S. Court of Appeals for the Sixth Circuit, decided April 3, 1971." 117 Cong. Rec. 6477. (May 10, 1971 daily ed.)

Moreover, throughout the 1950's, Congress refused this power despite repeated requests. See Theoharis and Meyer, The National Security Justification for Electronic Eavesdropping: An Elusice Exception, 14 Wayne L. Rev. 749, 764-65 (1968). When it did legislate, it did so in the most limited way possible: it said simply that whatever the President's powers were, they remained unaffected. As the Sixth Circuit concluded, the language "is not the language used for a grant of power. On the contrary, it was in our opinion clearly designed to place Congress in a completely neutral position in the very controversy with which this case is concerned." App. 33.

The Government seeks support for its position in a rather cryptic page from the Senate Committee Report, S. Rep. No. 1097, 90th Cong., 2d Sess. 94 (1968) (Govt. Br. 28-29). That page reads:

"These provisions of the proposed chapter regarding national and internal security thus provide that



the contents of any wire or oral communication intercepted by the authority of the President may be received into evidence in any judicial trial or administrative hearing. \* \* The only limitations recognized on this use is that the interceptions be deemed reasonable based on an ad hoc judgment taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself (Carroll v. United States, 267 U.S. 132 (1925)). The possibility that a judicial authorization for the interception could or could not have been obtained under the proposed chapter would only be one factor in such a judgment. No preference should be given to either alternative, since this would tend to limit the very power that this provision recognizes is not to be deemed disturbed."

But in Carroll, the Court insisted on probable cause, 267 U.S. at 155-56, a prerequisite which the Government strenuously rejects here. Govt. Br. 23.

And at another point in the Senate Report, when the Committee sets out the justification and scope of the legislation, the Committee said:

#### "NATIONAL SECURITY

It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveil-lance techniques are proper means for the acquisition of counterintelligence against the hostile action of foreign powers. Nothing in the proposed legislation seeks to disturb the power of the President to act in this

area. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake." S. Rep. No. 1097 at 69 (emphasis added).

Surely, if Congress was going to approve so major a departure from established constitutional principle in so sensitive an area, it would have done so in a clear and unambiguous manner.

#### C. Presidential Directives Cannot and Do Not Authorize This Power.

The Government also seeks to bootstrap its way by claiming that Presidential directives authorize such a power (Memo 3-4). But as Judge Ferguson pointed out in United States v. Smith, 321 F. Supp. 424 (C.D. Calif. 1971), petition for cert. pending, No. 71-239, and as Judge Keith agreed in the district court decision herein, App. 70-71, this was to be a narrowly circumscribed power, and in President Roosevelt's letter, was to be used only against aliens, so far as possible. The Court of Appeals below did not even discuss this contention.

Moreover, this kind of bootstrapping argument is dubious, to say the least, under the special facts of this case. The history of the 34 years between the Communications Act of 1934 and the Omnibus Crime Control Act of 1968 shows continuing controversy and impasse over the proper scope of electronic surveillance. See H. Schwartz, 67 Mich. L. Rev. at 455, especially 455 n. 1; Theoharis and Meyer, 14 Wayne L. Rev. at 755-68. Moreover, this seems to be the first time that the Government has openly proclaimed the right to use electronic surveillance on domestically "dangerous" individuals and groups. To conclude that by not

stopping it, Congress intended to ratify the legitimacy of a policy about which few, if any, knew, is to stretch the generally dubious doctrine of ratification by silence, into fantasy.

Finally, even if one takes the administrative directives for all they are worth, they do not necessarily authorize electronic surveillance without judicial scrutiny. Since there was no provision for such scrutiny under \$605 of the Communications Act, none was possible. One thus cannot know whether either President Roosevelt or his successors would have authorized such exclusively executive action, had there been an opportunity for judicially supervised eavesdropping, as there now is under 18 U.S.C. \$2500.

#### D. Practical Considerations of Competency, Confidentiality and Utility Do Not Justify Granting the Attorney General This Power.

The Government has not only understated the value of the interests jeopardized by its demand, but it has grossly overstated the considerations on the other side. These come down to the following:

- 1. The relevance of the President's constitutional obligation to protect this nation;
- 2. The comparative competence and reliability of the executive and judicial branches;
- 3. The practical benefits and detriments from granting such a power to the Attorney General.

# 1. The president's obligation to defend the nation does not justify wholesale invasion of individual liberty by the Attorney General.

Obviously, the president has the obligation to defend the nation, and equally obviously, he must have the power to obtain information. But such an obligation and power are the barest beginning of analysis. It certainly does not imply anything about what methods may be used, especially those that conflict with the most cherished values of our nation. Nor does it imply anything about giving that power completely to the nation's chief prosecutor, who is not politically responsible and who is subject to all the short-comings classically described by Mr. Justice Jackson in Johnson v. United States, 333 U.S. 10, 13-14, and most recently noted in Coolidge v. New Hampshire, 403 U.S. at 449-51.

#### The Attorney General is no more competent or trustworthy than the courts in determining when and whether electronic surveillance should be permitted.

Much of the Government's brief is devoted to the thesis that the Courts are not competent to evaluate the determination of when a particular surveillance should be undertaken. In the court below, the Government justified this on the ground that many considerations, some not primarily of a factual nature, are relevant. In this Court, the Government has virtually abandoned that notion and restricts itself to the related but separate considerations of secrecy and competency.

As to the first, the Government talks mysteriously of material that cannot be disclosed to a court. Govt. Br. 24. But this is true of every criminal investigation and prosecution. No one requires the Attorney General to submit all of his facts, and he never does—after all, there are often criminal prosecutions for the threats to security for which the Attorney General seeks this authority, and somehow these are instituted without disclosing everything. Indeed, most federal court-ordered surveillance is allegedly for investigating large-scale complex conspiracies involved in organized crime, see S. Rep. No. 1097 at 70-74, and involve much more than the "small number of single facts" asserted by the Government to make up the typical search warrant situation. Govt. Br. 24.

#### The Government argues that:

"Disclosure of the reasons for a surveillance or even that it is to be conducted could, because of the sensitive nature of the information sought and of most surveillance targets, make an effective surveillance impossible and thus prevent the government from obtaining vital information." Govt. Br. 24-25.

which includes many former United States Attorneys) to keep such applications secret, as they are required to do under 18 U.S.C. §2518(8)? After all, it is not the courts that have leaked stories about the wiretapping of Martin Luther King, see Navasky, Kennedy Justice 35° (1971), or Joe Namath. Moreover, there will be no "disclosure of the reasons for a surveillance or even that it is to be conducted," Govt. Br. 23, since the proceedings are in camera until after criminal prosecution is started, or the eavesdropping is otherwise completed. Also, other methods to ensure confidentiality are available, such as an appli-

cation to the Chief Judge of the Court of Appeals. See Opinion below, App. 38.

And the concern is really baseless. Over 15 years ago, former Brooklyn District Attorney Edward Silver denied the need for any exemption from judicial scrutiny for fear of judicial disclosure, while supporting wiretapping authority in general. See Hearings on Wiretapping Before Subcommittee No. 5 of the House Committee on the Judiciary, 84th Cong., 1st Sess., 98 (1955). Judge Silver spoke from long experience since he has been obtaining eavesdropping orders from New York judges for many years. See also Donnelly, Comments and Caveats About the Wire Tapping Controversy, 63 Yale L. J. 799, 809 (1954).

3. "Centralization" and "uniformity" are not sufficient to outweigh the potential and actual harm from the widespread electronic surveillance actually engaged in by the executive.

Most of the arguments for the Government's position prior to this series of cases have focused on the need to ensure "centralization" and "uniformity," see Brownell, The Public Security and Wiretapping, 39 Corn. L. Q. 195, 210-11 (1954); Rogers, The Case for Wiretapping, 62 Yale L. J. 792, 797-98 (1954). It is difficult to believe that such administrative considerations could possibly outweigh the great threat to individual liberty presented by the power sought by the Government.

Moreover, the uniformity seems illusory. Attorneys General shift in both policy and attitude far more than do the courts, where there is life tenure. See generally Donnelly, 63 Yale L. J. at 809.

#### IV.

Alderman v. United States, 394 U.S. 165, is a constitutional decision and should not be overruled.

## A. Alderman Should Not Be Overruled.

The reasoning of Mr. Justice White in Alderman is so cogent that Amici will not argue this point.

# B. Alderman Is a Constitutional Decision.

The Government seeks to argue that Alderman is not a constitutional decision, but merely "supervisory." Govt. Br. 40. This contention is both simplistic and wrong, as can be seen from both the language of Alderman and later cases and an analysis of "supervisory power" theory.

### 1. The Alderman language.

In the first place, the Court's language in Alderman makes it clear that Fourth Amendment rights cannot be adequately protected if the issue of relevancy is left to the judge for an in camera determination. This language is very strong indeed, as the following excerpt shows:

"Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands." 394 U.S. at 184.

This one sentence alone makes it indisputable that the Court did not think it was dealing with a mere procedural

But we have more than this language in Alderman. Two weeks later, when the Court reaffirmed its position in Alderman, it again made it clear that Alderman was constitutional doctrine. In Taglianetti v. United States, 394 U.S. 316, it distinguished the issues of legality and standing, where disclosure is not required, from the relevancy issue, on the ground that

"the in camera procedures at issue there [Alderman] would have been an inadequate means to safeguard a defendant's Fourth Amendment rights." 394 U.S. at 317.

This language, which echoes the language of Mapp v. Ohio itself when the Court adopted the exclusionary rule, 367 U.S. 643, 652-53 (1961) ("other remedies have been worthless and futile") makes clear that the very viability of the Fourth Amendment is at stake.

Indeed, the argument that only the supervisory power is involved was once made with respect to the exclusionary rule itself, see *Mapp* v. *Ohio*, 367 U.S. at 649. The argument was of course rejected there, and its treatment here should be similar and for the same reason: nothing else will do to protect Fourth Amendment rights.

#### 2. The "supervisory power."

The Government Brief refers to the "supervisory power" as if it were totally separate from constitutional considerations. Such an approach is simplistic and wrong. Calling something an exercise of the "supervisory power" does not imply that it can be dispensed with easily, or that it is in some sense unimportant. The so-called "supervisory nower" is often invoked in order to avoid having to decide a constitutional question, and not to decide, by implication or directly, that the resulting rule is in fact not a constitutional requirement. For example, the rule of Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966) that a jury trial is required for a criminal contempt penalty of more than six months, was established "in the exercise of the Court's supervisory power." Two years later, however, it was in effect followed in Bloom v. Illinois, 391 U.S. 194 (1968), where a somewhat similar rule was applied to states on constitutional grounds. See also McCarthy v. United States, 394 U.S. 459 (1969) and Boykin v. Alabama, 395 U.S. 238 (1969).

Indeed, even in what remains a supervisory power situation, Jencks v. United States, 353 U.S. 657 (1957), Mr. Justice Brennan, who wrote for the Court in Jencks, subsequently noted that "it is true that our holding in Jencks was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision." Palermo v. United States, 360 U.S. 343, 362-63 (1959) (Brennan, J. concurring) (emphasis added).

The central issue is really not whether the ruling is labeled "supervisory" or "constitutional." Rather, as Professor Alfred Hill put it in his penetrating article, The Bill of Rights and the Supervisory Power, 69 Colum. L. Rev.

181, 191 (1969), the real issue is whether the rule in question is necessary to avoid "materially diminish[ing] the effectiveness of the implementation that is constitutionally mandated." Some rules are, and some are not. The language quoted from both Alderman and Taglianetti expressly state that, as the Court put it in the latter case, "in camera procedures at issue there would have been an inadequate means to safeguard as defendant's Fourth-Amendment rights."

#### 3. Relevancy, standing and legality.

As the Court pointed out in Taglianetti, this is not to say that "an adversary proceeding and full disclosure [are required] for resolution of every issue raised by an electronic surveillance." Standing, legality, voice identification-none of these really requires the same kind of informed analysis of specific conversations that relevancy and taint do. In some cases, deciding legality may not really require anything more than analysis of the basis on which the eavesdropping was authorized; any other contentions, such as that the eavesdropping exceeded the authority as to time, place or person, can usually be determined in camera, although even here an adversary proceeding would seem at least useful. Asserting standing will usually require even less of a detailed knowledge of what was overheard, especially in view of the restrictive standing rules in Alderman limiting standing to one whose conversations were overheard, or on whose premises such surveillance occurred. Both can simply be alleged and the Court can check, in camera, for as the Court indicated in Taglianetti, it is not true here "that 'the task is too complex, and the margin for error too great, to rely wholly. on the in camera judgment of the trial court."

In contrast, the Court in Alderman stressed why in camera procedures were inadequate. The problem is even more acute than the Court indicated, where electronic eavesdropping is concerned: the tapes are rarely introduced in evidence and are used almost exclusively for leads. Moreover, much of this eavesdropping is explicitly for "intelligence," the relevancy of which to any specific crime is often well below the surface. Thus, unlike these other issues, the relevancy issue where electronic eavesdropping is concerned is not only complex but exceptionally difficult and generally present.

#### CONCLUSION

The Government cites *United States* v. *Robel*, 389 U.S. 258, 267 (1967) for the proposition that "the Constitution has never been read as depriving the Government of the power to protect itself against subversion." But as Judge Edwards quoted Benjamin Franklin:

"They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

Moreover, the true significance of Robel, which struck down a ban on employment of Communists, is Chief Justice Warren's oft-quoted comment that the

"concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile." 389 U.S. at 264.

This case tests the question of whether the rule of law is to be imposed on all officials, high and low. As Mr. Justice Brandeis said in Olmstead:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." 277 U.S. at 485.

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## APPENDIX A

#### Statutes

# 18 U.S.C. §2518(1)(c)

- §2518. Procedure for interception of wire or oral communications
- (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
  - (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

## 18 U.S.C. §2518(7)

- (7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—
  - (a) an emergency situation exists with respect to conspiratorial activities threatening the national se-

curity interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

## APPENDIX B

# Department of Justice—Senator Kennedy Correspondence

(Letterhead of United States Senate, Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, Washington, D. C. 20510)

February 5, 1971

Honorable John Mitchell
Office of the Attorney General
Department of Justice
Washington, D.C.

Dear Mr. Attorney General:

As you know, the Subcommittee on Administrative Practice and Procedure has in recent years been extremely interested in the subject of electronic surveillance, both in connection with its continuing study of practices of federal agencies and others that may constitute invasions of privacy and its role in the development and processing of the legislation which eventually became Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Both of your immediate predecessors and other Department officials appeared before the Subcommittee and their assistance was extremely valuable in our work. I know that your knowledge and interest in this area will also prove helpful to us, and we look forward to working closely with you and your staff.

There has been increasing concern in the Congress and in the Nation in regard to the current practices of the

Federal government in the utilization of electronic surveillance. You yourself have announced a six-fold rise in the number of court-ordered wiretaps and microphone eavesdrop installations between calendar 1969 and calendar 1970, and there have been a growing number of court cases involving surveillances initiated by the Federal government without court orders. You have offered detailed and impressive defenses of the increase in installations under court order, and, of course, we will be assisted in reaching our own conclusions as to that type by the annual reports of the Department on its applications to the courts for wiretap and eavesdrop orders.

In the case of electronic surveillance installations made without court orders, the public impression is that such installations are not only being made more frequently, but also that they are being used in a growing spectrum of types of cases. Many citizens fear that installations without court order are being used to avoid the requirements governing court-ordered installations, and especially the necessity for the government to prove probable cause as to commission of specified criminal offenses to obtain a court order. They reason that if there were facts to establish that such criminal offenses were involved in a given case, the government would proceed by court order, and that the increasing avoidance of this procedure reflects increasing surveillance of individuals and groups whose only offense is disagreement with government policies, personal eccentricity, outspokenness, or participation in lawful activities of organized dissent, or a combination of these.

The problem for those of us who must assess these concerns is that in the field of purely Executive wiretapping and eavesdropping, as opposed to Executive tapping and bugging under Judicial authority, we have scant information on which to base our judgments. The Director of the Federal Bureau of Investigation has annually testified as to the number of "national security" installations, and other Department officials including the Attorney General have from time to time also referred to such a figure in Congressional testimony or correspondence. I believe that the most recent such report referred to 36 wiretaps and 2 microphones.

In view of your own statements as to the increased number of non-court-ordered installations, the growing public concern, the need of the Congress and the public for more information from which to determine whether and how the limitations on such installations in Section 2511(3) of Title III are being adhered to, Constitutional questions aside, I am confident that you will agree that this would be an opportune time to shed some light on Federal practices in this area.

Would you, therefore, kindly provide the following information as soon as possible, sending us immediately those items of information which are readily available, and the remainder when obtained. I recognize the fact that some of the statistics requested will be based on documents which are classified, but the requests have been phrased so as to admit of answers which should be able to be unclassified. However, if you see a need to classify any particular answer, please provide it separately, and it will be handled on a classified basis.

- A. For the period June 19, 1968 to December 31, 1968, for calendar 1969, and for calendar 1970, please provide:
- 1. The number of electronic surveillance installations placed in operation or continuing in operation at any time during the period, counting each device, connection, or other unit as a separate installation where more than one installation was utilized to surveil the same subject or group of subjects.
- 2. Of these, for each period the number of each type of installation, i.e. wire communication intercepts, oral communication intercepts, combination intercepts, or other.
- 3. For each period, the number of installations in each of the following time categories: under 1 week, 1 week to 1 month, 1 month to six months, over six months.
- 4. For each period, the number of installations in each use category itemized in Section 2511(3) of Title 18, U.S. Code, as added by Title III of P.L. 90-351, i.e.
- a. to protect the Nation against actual or potential attack or other hostile acts of a foreign power,
  - b. to obtain foreign intelligence information,
- c. to protect national security information against foreign intelligence activities,
- d. to protect against the overthrow of the government by force or other unlawful means,
- e. to protect against other clear and present danger to the structure or existence of government (for this category, describe general nature of danger).

- 5. For each period, the number of installations the dissemination of whose product fell in each of the following categories:
- a. disseminated only to 5 or fewer persons within the Federal government,
- b. disseminated only to 5 to 50 persons within the Federal government,
- c. disseminated to over 50 persons in the Federal government only,
- d. dissemination total unknown but available on request to properly cleared Federal employees only,
  - e. disseminated to state, local, or private agencies.
- B. In the light of the recent conflicts among the Federal courts as to the Constitutional and statutory limits of the government's power to initiate electronic surveillance without judicial authority, what interim standards and procedures has the Department adopted pending ultimate determination of these limits on a nation-wide basis?

I appreciate your assistance and look forward to your reply.

Sincerely,

Edward M. Kennedy
Chairman
Subcommittee on Administrative
Practice and Procedure

# THE ATTORNEY GENERAL WASHINGTON

February 16, 1971

Honorable Edward M. Kennedy, Chairman Subcommittee on Administrative

Practice and Procedure United States Senate Washington, D.C. 20510

### Dear Mr. Chairman:

I am pleased to acknowledge receipt of your letter of February 5, 1971, relating to the subject of electronic surveillance. Response to your requests will be made as soon as the appropriate material can be compiled and considered.

Sincerely,

/s/ John N. MITCHELL John N. Mitchell

JNM:skm

ASSISTANT ATTORNEY GENERAL INTERNAL SECURITY DIVISION

# DEPARTMENT OF JUSTICE WASHINGTON

March 1, 1971

Honorable Edward M. Kennedy Chairman Subcommittee on Administrative Practice and Procedure United States Senate Washington, D.C. 20510

## Dear Mr. Chairman:

The Attorney General has asked me to respond to your inquiry of February 5, 1971, with respect to administrative practices and procedures relative to electronic surveillance.

In accordance with your suggestion, we would ask that the breakdowns furnished with respect to the duration of surveillance be treated as confidential since an examination of the breakdown might indicate a fixed number of permanent surveillances.

With respect to your questions A1, A2, and A3, we submit the following:

June 19 to December 31, 1968

Telephone Surveillances

In operation less than one week
In operation 1 week to 1 month
In operation 1 to 6 months
In operation more than 6 months

50

	Microphone Surveillances
	In operation less than one week In operation 1 week to 1 month In operation 1 to 6 months
	In operation more than 6 months  Total
	Calendar Year 1969
	Telephone Surveillances
	In operation less than 1 week
à	In operation 1 week to 1 month
	In operation 1 to 6 months
1	In operation more than 6 months TOTAL
	Microphone Surveillances
-	In operation less than 1 week
	In operation 1 week to 1 month
	In operation 1 to 6 months
	In operation more than 6 months  Total
	Calendar Year 1970
	Telephone Surveillances
1	In operation less than 1 week
	In operation 1 week to 1 month
	In operation 1 to 6 months
	In operation more than 6 months TOTAL

# Microphone Surveillances

In operation less than 1 week
In operation 1 week to 1 month
In operation 1 to 6 months
In operation more than 6 months
Total

The annual totals set forth above can be misleading in that they reflect the total installations authorized or in place during the periods described. The total maximum number of surveillances in operation at any one time during the periods described are as follows:

# June 19 to December 31, 1968

Microphone Surveillances  endar Year 1969  Telephone Surveillances  Microphone Surveillances	Microphone Surveillances  Indar Year 1969  Telephone Surveillances	Telephone Surveillances .		 
Telephone Surveillances  Microphone Surveillances	Telephone Surveillances  Microphone Surveillances  endar Year 1970	Microphone Surveillances		 
Telephone Surveillances  Microphone Surveillances	Telephone Surveillances  Microphone Surveillances  endar Year 1970	. I V 1000		
Microphone Surveillances	Microphone Surveillancesendar Year 1970			
	endar Year 1970	Telephone Surveillances	`	 
endar Year 1970		Microphone Surveillances		 
		endar Year 1970		

With respect to your question A4, the installations cannot be categorized exclusively under a single criterion; however, each installation meets one or more of the criteria itemized in Section 2511(3) under Title 18 of the United States Code.

Departmental records do not, as a practical matter, permit us to answer question A5 with the specificity you request.

However, Department policy limits dissemination of information of the nature inquired of to persons on an actual "need to know" basis. Appropriate security classifications and control markings are imposed on such information. None, of this information is disseminated to state or local governments or agencies except in rare instances in order to prevent the commission of a serious felonious act. In such instances, the source of the information is not divulged.

In response to question B, we would advise that since the Katz decision in 1967, the Department has operated under the more restrictive guidelines dictated by that decision and the standards enunciated in the Omnibus Crime Control and Safe Streets Act of 1968, which codified the parameters of the "national security" exception. No changes in Department practices or procedures have been initiated by reason of the conflict in the recent district court decisions to which you refer.

Sincerely yours,

/s/ ROBERT C. MARDIAN
Robert C. Mardian
Assistant Attorney General

(Letterhead of United States Senate, Committee on the Judiciary, Washington, D.C. 20510.)

March 12, 1971

Mr. Robert C. Mardian Assistant Attorney General Department of Justice Constitution Avenue and Tenth Street, N.W. Washington, D.C. 20530

#### Dear Mr. Mardian:

Thank you for your letter of March 1 replying to some of my inquiries relating to electronic surveillance.

Although I can appreciate that each of the surveillances operated without court order may not necessarily be susceptible of categorization exclusively under anythingle criterion enumerated in Section 2511 (3) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, we would nevertheless like to have a numerical break-down by category or categories of the installations described in your letter. In this regard, we would also appreciate your supplying us with a detailed description of the administrative practices and procedures of your Department which culminate in a determination whether Section 2511 (3) criteria have been met and whether a recommended surveillance should be approved.

I appreciate your assistance.

Sincerely,

/s/ Edward M. Kennedy Edward M. Kennedy (Letterhead of Department of Justice, Washington 20530, Assistant Attorney General, Internal Security Division)

March 23, 1971

Honorable Edward M. Kennedy Chairman Subcommittee on Administrative Practice and Procedure United States Senate Washington, D.C. 20510

#### Dear Mr. Chairman:

As indicated to you in my letter of March 1, 1971, the subject matter of question A-4 is such as to preclude categorization under a single criterion and no such categorization exists.

I am unable to supply you with a "detailed description of the administrative practices and procedures" you request, other than to say that all requests for telephonic and microphonic surveillances, at least since January 20, 1969, to the Attorney General have come from the Director of the Federal Bureau of Investigation personally. Such requests are handled exclusively by the Attorney General acting for the President of the United States.

This Department has heretofore publicly set forth the considerations involved in making such determinations and the reasons for refusing to disclose the bases for the Executive's decision. In the brief of the United States filed recently in the Ninth Circuit Court of Appeals we said:

"In authorizing the use of electronic surveillance, the President through the Attorney General must weigh many factors, not all of a purely factual nature, which he cannot, and should not be required to, produce before a magistrate. Moreover, in making such a decision the President must rely upon the entire spectrum of information available only to him, much of which is derived from sources which, by their nature, are secret. Such information, more often than not, involves both the Nation's foreign and domestic affairs inextricably intertwined. Any attempt to legally distinguish the impact of foreign affairs matters from internal subversive activities or to isolate one particular factor upon which an eventual decision is based, is an exercise in futility and eloquently demonstrates the wisdom of leaving these decisions to the Chief Executive who alone is in a position to make such a judgment and who is answerable to the people from whom the power is derived.

Another weighty factor bearing upon this issue is the fact that disclosure of the bases for the Attorney General's decision or the fact that such a surveillance is to be conducted may in itself prejudice the national interest."

We hope the foregoing will be of assistance to you.

Very truly yours,

/s/ ROBERT C. MARDIAN
Robert C. Mardian
Assistant Attorney General

Mr. Robert C. Mardian Assistant Attorney General Internal Security Division Department of Justice Washington, D.C. 20530

### Dear Mr. Mardian:

I am writing with reference to your letter of March 23 advising that there is no categorization of the surveillances operated without court order under the criteria enumerated in Section 2511(3) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

In view of the position taken by your Department in the courts that certain of such surveillances are employed for the purpose of gathering "foreign intelligence information", and that other of such surveillances are employed for the purpose of gathering "intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government", would you please provide us with a numerical break-down of the installations described in your March 1 letter under these two classifications.

I appreciate your assistance.

Sincerely,

Edward M. Kennedy Chairman Subcommittee on Administrative Practice and Procedure

## DEPARTMENT OF JUSTICE WASHINGTON

ASSISTANT ATTORNEY GENERAL INTERNAL SECURITY DIVISION

April 23, 1971

Honorable Edward M. Kennedy Chairman Subcommittee on Administrative Practice and Procedure United States Senate Washington, D.C. 20510

### Dear Mr. Chairman:

This is in response to your most recent letter of April 1, 1971, in which you request a numerical breakdown of those surveillances operated without court order, which are employed for the purpose of gathering "foreign intelligence information" and those which are employed for the purpose of gathering "intelligence information deemed necessary to protect the Nation from attempts of domestic organizations to attack and subvert the existing structure of the government." You indicate that these two categories are derived from the position recently taken in the courts by the Department of Justice.

The position taken by the Department in the courts has drawn a distinction between two separaté but closely related powers of the President, pursuant to which he may constitutionally authorize electronic surveillance to gather intelligence information without securing a prior warrant. In the brief of the United States filed recently in the Ninth Circuit Court of Appeals we said:

In United States v. Belmont, 301 U.S. 324, 328 (1937), the Court recognized the existence and extent of one of these inherent Presidential powers when it held that "the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this power [is] not subject to judicial inquiry or decision." . . . the President, in his dual role as Commander in Chief of the armed forces and Chief Executive, possesses another serious power and responsibility—that of safeguarding the security of the Nation against those who would subvert the Government by unlawful means. (Brief, pages 2-3).

As we have indicated, the inherent powers of the Chief Executive to conduct foreign affairs and to protect the national security, while somewhat related, are separate and distinct. The Congress itself recognized the distinction in the Omnibus Crime Control and Safe Streets Act of 1968. (Brief, pages 17-18).

This position was not intended to imply that any single surveillance could be considered as being employed solely pursuant to either one of the aforementioned powers. As I have indicated previously, the decision to employ such surveillance is based on a consideration of information involving "both the Nation's foreign and domestic affairs inextricably intertwined." Accordingly, the Department has never attempted such a categorization.

We hope the foregoing will be of some assistance.

Sincerely,

/s/ ROBERT C. MARDIAN
Robert C. Mardian
Assistant Attorney General

## APPENDIX C

# Letter to Hon. John N. Mitchell from Constitutional Law Experts

June 20, 1969

The Honorable John N. Mitchell
The Attorney General
of the United States
The Department of Justice
Washington, D.C.

#### Dear General Mitchell:

The New York Times recently reported that the Justice Department claims that it may wiretap and bug domestic groups which seek "to attack and subvert the Government by unlawful means," free from judicial supervision. To grant such a claim would gravely threaten some of our most fundamental liberties as well as the rule of law itself. Today, both liberty and law are undergoing tests as severe as any in our history, and this claim by an agency charged with furthering these values, can only make their defense even more difficult. Nor is such authority even necessary, given the unprecedentedly broad powers recently granted the Government with respect to electronic eavesdropping, and domestic subversion and disorder.

Electronic bugging and wiretapping are so dangerous to privacy, freedom of speech and freedom of assembly that until just a few years ago, few were willing even to consider granting such powers except for the most serious offenses like espionage, treason, kidnapping, and murder. Now, of course, the Omnibus Crime Control and Safe Streets Act of 1968 permits this device for a broad range of offenses, though generally under court supervision. And though an argument can be made for an exemption from judicial scrutiny for eavesdropping in foreign affairs—as to which we take no position except to note that the Supreme Court's opinion in Katz v. United States expressly left this question open—we firmly condemn this attempt to obtain such absolute power against our own people in domestic affairs.

The Founding Fathers, who were not unacquainted with domestic threats and disorders of the most serious nature, understood that no one can be trusted with unchecked power over the lives and effects of other men. This insight was incorporated into the Fourth Amendment, with its provision for judicial controls over official searches and seizures. Today, electronic devices are infinitely more intrusive, invisible and dangerous. To accept the Department's claim of non-reviewable discretion in the use of such devices, to agree that only "the executive and not the judicial branch" has the "competence" to determine whether "it is appropriate to utilize electronic surveillance" of domestic groups, is to repudiate one of our oldest and most vital traditions. Why indeed is the Department unwilling to submit itself to judicial oversight? The proceedings are ex parte and can remain confidential as long as necessary, and the federal judiciary has an unblemished record for maintaining such confidentiality.

The argument that Big Brother knows best has been steadily invoked in order to resist the application of many other provisions of the Bill of Rights, and it has consis-

tently been rejected. As was pointed out by Justice Robert H. Jackson, a man whose Nuremberg experience had taught him much about a police state and yet one who was no friend of disorder, "The point of the Fourth Amendment, which often is not grasped by zealous officers, is ... that its protection consists in requiring that those [normal inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. U.S., 333 U.S. 10, 14 (1948).

Nor can we ignore the fact that the power sought to be legitimated by the Department was used not only against five political dissenters who are defendants in the Chicago conspiracy, but against one of the most revered leaders of our time, Martin Luther King, Jr., even after President Johnson ordered cessation of all eavesdropping. Surely there can be no more conclusive—or sad—demonstration of how dubious is the "competence" of these "men of zeal, well-meaning but without understanding," to use Justice Brandeis' words. If Martin Luther King, Jr., the Black Muslim Leader Elijah Muhammed, and vigorous opponents of the Vietnam war are considered appropriate subjects for such gross violations of their rights, which group vigorously seeking change, whether radical, liberal or conservative, is safe?

Finally, it was reported that the Department says it needs such authority "to gather intelligence information concerning those organizations which are committed to the use of illegal methods to bring about changes in our form of government and which may be seeking to foment violent disorders." But such authority appears to be in conflict with §2516 (1)(a), (g) of Title III of the Crime

Control Act which seems to require that application be made to a court for authority to use electronic surveillance to obtain evidence of offenses under Ch. 115 of the United States Criminal Code (Treas , Sedition and Subversive Activities) and Ch. 102 (Riots), as well as for evidence of a conspiracy to commit any such offense, precisely the crimes for which the Department is seeking the authority to eavesdrop without judicial supervision:

Forty years ago, Justice Brandeis warned that "our Government is the potent, the omnipresent teacher... If the Government becomes a law breaker, it breeds contempt for law; it invites every man to be a law unto himself." At commencements throughout the nation these past weeks, students have charged their elders with hypocrisy and worse for urging them to stay within the limits of the law in seeking to achieve their goals. If the Department of Justice, whose primary task it is to defend and further liberty and the rule of law, does not abandon its claim, it will then be difficult indeed to deny the youthful indictment. The Government has confessed error before in the interests of justice, and we call upon it to do so again in this instance.

Yours very truly,

Anthony G. Amsterdam Professor of Law University of Pennsylvania Law School

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#### IN THE

EL CO

# Supreme Court of the United States

TERM, 1971

No. 70-153

Supreme Court, U.S. FILED

JAN 21 1977

ROBERT SEAVER CLERK

UNITED STATES OF AMERICA

Petitioner.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION and HONORABLE DAMON J. KEITH; and JOHN SINCLAIR, LAWRENCE "PUN" PLAMONDON, and JOHN WATER-HOUSE FORREST,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

### BRIEF FOR THE DEFENDANT-RESPONDENTS

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#### IN THE

# Supreme Court of the United States

TERM, 1971

No. 70-153

UNITED STATES OF AMERICA,

Petitioner,

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION and HONORABLE DAMON J. KEITH; and JOHN SINCLAIR, LAWRENCE "PUN" PLAMONDON, and JOHN WATER-HOUSE FORREST,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

### **BRIEF FOR THE DEFENDANT-RESPONDENTS**

## **OPINIONS BELOW**

The opinion of the Court of Appeals (App. 33-85) is reported at 444 F.2d 651 (6 Cir. 1971) and the District Court opinion (App. 23-32) is reported at 321 F. Supp. 1074 (E.D. Mich. 1971).

## **JURISDICTION**

The Defendant-Respondents accept the statement of the Government as to the Jurisdiction of this Court.

## **QUESTIONS PRESENTED**

- 1. Whether the warrantless and general electronic surveillance involved in this case, which was authorized by the Attorney General on the basis of his sole judgement that the surveillance was "necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government" violated the Fourth Amendment to the Constitution?
- 2. Whether the warrantless and general electronic surveillance involved in this case, which was authorized by the Attorney General on the basis of his sole judgement that the surveillance was "necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government" violated the First Amendment to the Constitution?
- 3. Whether the Executive's claim of power to engage in a program of warrantless and general electronic surveillance of citizens and domestic organizations considered in its sole discretion as being involved in attempts "to attack and subvert the existing structure of the government" violates the First and Fourth Amendments to the Constitution and the fundamental principle of separation of powers?
- 4. Whether this Court should retreat as the Government suggests from its constitutional holding in Alderman v. United States that conversations overheard by illegal surveillance to which defendants have standing to object must be disclosed for the purpose of an adversary hearing on relevance?
- 5. Whether appellate review by way of mandamus in the Court of Appeals was appropriate at this stage of the proceeding?

## \*CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional and statutory materials are set forth in Appendix B to his Brief.

#### STATEMENT OF THE CASE\*

This case arises out of a criminal prosecution in the United States District Court for the Eastern District of Michigan. The three defendants therein, John Sinclair, Lawrence ("Pun") Plamondon, and John Forrest are charged with conspiracy to destroy government property in violation of 18 U.S.C. § 371, and defendant Plamondon alone with destruction of government property in violation of 18 U.S.C. § 1361. They were indicted on December 7, 1969, and they pleaded not guilty.

Prior to trial, on October 5, 1970 the defendants filed a motion, inter alia, to compel disclosure of electronic surveillance. App. 8-9. The Government replied by filing with the District Court, logs of intercepted conversations of defendant Plamondon, together with an affidavit of Attorney General John Mitchell stating that the conversations had been overheard through "wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the Government." The Affidavit stated that he had expressly authorized the installation of the devices. App. 20-21. The Attorney General further claimed that disclosure of the logs "would prejudice the national interest." Id.

<sup>\*</sup>Counsel for defendant-respondents wish to express their gratitude for the invaluable assistance they have received from Linda Huber, University of Washington, School of Law, 1971; Dr. John Anthony Scott, Professor of Legal History, Rutgers University, School of Law; Paul Acinapura, Paul Casteleiro, Robert Golcheski, Donna Lieberman, Mark Manewitz and Jim Yates, student members of the Constitutional Litigation Clinic of the Rutgers University, School of Law; Arthur Kahn and Carmela Ackman, students in the Constitutional Litigation Seminar of the Rutgers University, School of Law; Deena Atlas, Patricia Fuentes, Mary Hanlon, Paul Schachter, Brenda Smith, Elizabeth Urbanowicz, Penny Yates, legal workers and staff of the Rutgers University, School of Law.

The Government argued that the surveillances in question, although not authorized by a prior judicial warrant, were nevertheless rendered lawful by the authorization of the Attorney General. The Government stated:

> There can be no question that the President must and will engage in intelligence gathering operations which he believes are necessary to protect the security of the nation. Government's Memorandum Relating to Electronic Surveillance, p. 4:

The Government thus characterized the issue before Judge Keith as one concerning the inherent power of the President.<sup>1</sup>

Although the Government conceded that the issue before the Court "... involves the legality only of those electronic surveillances deemed necessary to gather intelligence information to protect the nation from internal attack and subversion, Id. at 6, it argued that the reasons for the legality, which it assumed, of warrantless foreign intelligence surveillance would apply by analogy to the domestic area as well. Id. at 6. The Government stated that the decision to conduct such surveillance was entirely a matter of Executive concern thus "courts should not question the decision of the Executive Department." Id. at 7. The Government explained that the judgment to engage in investigative surveillance rested upon "a wide variety of considerations." such as the "purpose of a subversive organization" and the "possible danger" it presents, which can only be evaluated properly by the Executive. Id. at 9.

The Government further requested that if the Court ordered disclosure, that it first notify the Government so that the Attorney General could determine how to proceed. Id. at 10.

<sup>1&</sup>quot;[T] he question presented here is whether in exercising his inherent power as Chief Executive Officer of the United States the President may, without violating the Fourth Amendment, authorize the employment of wiretapping to gather intelligence information." Id at 5.

Judge Keith rejected the Government's arguments and held that the warrantless surveillance was unlawful, adopting the rule and rationale of Judge Warren E. Ferguson.in United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971). As to the supposed "inherent power" of the President, Judge Keith stated: "The Court cannot accept this proposition for we are a country of laws and not of men." App. 27.

The Judge called attention to the broader significance of the Government's claims beyond the case before him.

The contention by the Government that in cases involving "national security" a warrantless search is not an illegal one, must be cautiously approached and analyzed. We are, after all, dealing not with the rights of one solitary defendant, but rather, we are here concerned with the possible infringement of a fundamental freedom guaranteed to all American citizens. App. 28.

The Judge affirmed that the Attorney General was indeed bound by the warrant requirement, by which a court makes. "an objective determination whether or not probable cause of some criminal activity exists, which activity would make the searching reasonable and not in violation of Fourth Amendment rights." App. 30. He noted that the Attorney General's Affidavit would have been insufficient basis for issuance of a search warrant, since no allegations were made of probable cause of some criminal activity, but that if such probable cause had existed a search warrant could have been readily obtained. App. 31-32. He concluded that the Attorney General's claims were without foundation.

Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today. App. 32.

The Court held the surveillance to be illegal and on January 25, 1971, it ordered that the Government make full disclosure to the defendant of his monitored conversations so a hearing on taint could take place. App, 32.

The Government proceeded to file with the Sixth Circuit Court of Appeals a Petition for a Writ of Mandamus to, command Judge Keith to vacate his order of disclosure.

The Government once again described its claim before the Court of Appeals as based on the inherent powers of the President.<sup>2</sup>

The Government again made clear, as it had in the District Court, that the case involved wholly domestic considerations:

As indicated earlier, the surveillances involved in this case were authorized not to gather "foreign intelligence" information nor to gather information relating to attempts of a foreign power to overthrow our government, but to gather information which the President, acting through the Attorney General, had determined was necessary to protect the national security against the threat posed by individuals and groups within the United States. Id. at 17.

It argued that a judicial warrant ought not to be required because complicated factors, "not all of a factual nature," make the judgment to conduct electronic surveillance appropriate solely to the Executive. Government's Supplemental Memorandum for the Petitioner, p. 17-18.

The specific question raised by this case is whether, in exercising his inherent power, as Chief Executive, to protect the nation's security, the President may, without violating the Fourth Amendment, authorize the employment of wiretapping to gather intelligence information without securing a prior warrant."

Government's Memorandum in Support of Petition for a Writ of Mandamus, p. 8.

The Government explained the nature and source of the power claimed for the President:

The President, in his dual role of Commander-in-Chief of the Armed Forces and Chief Executive, possesses another serious power and responsibility, that of safeguarding the security of the nation against those who would subvert the Government by unlawful means. This power is the historical power of the sovereign to preserve itself. Id. at 3.

The Court of Appeals for the Sixth Circuit ruled that the "great issues at stake" justified review on the merits by Mandamus.

It denied the Government's petition and affirmed the District Court's order of disclosure of the illegal surveillance.

The Court of Appeals set forth its responsibility in deciding the case:

It is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of our land. No one proclaimed this message with more force than did one of the first and one of the greatest Chief Justices of the United States. App. 57.

The Court held that there was no basis in law for the Executive's claim of inherent power to conduct warrantless surveillance.

The government has not pointed to, and we do not find, one written phrase in the Constitution, in the statutory law, or in the case law of the United States, which exempts the President, the Attorney General, or federal law enforcement from the restrictions of the Fourth Amendment in the case at hand. It is clear to us that Congress in the Omnibus Crime Control and Safe Streets Act of 1968, 18.U.S.C. § 2510 exeq. (Supp. V, 1965-69), refrained from attempting to convey to the President any power which he did not already possess.

Essentially, the government rests its case upon the inherent powers of the President as Chief of State to defend the existence of the State. We have already shown that this very claim was rejected by the Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and we shall not repeat its holding here. App. 59.

The Court further stated that the Executive's claim of inherent power violated historical constitutional principles of restraints on government and separation of powers:

An additional difficulty with the inherent power argument in the context of this case is that the Fourth Amendment was adopted in the immediate aftermath of abusive searches and seizures directed against American colonists under the sovereign and inherent powers of King George III. The United States Constitution was adopted to provide a check upon "sovereign" power. The creation of three coordinate branches of government by that Constitution was designed to require sharing in the administration of that awesome power.

It is strange, indeed, that in this case the traditional power of sovereigns like King George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign. App. 59-60.

The Court recognized the fears of the moment that led to the Executive's claim of power.

The argument for unrestricted employment of Presidential power to wiretap is basically an argument in terrorem. It suggests that constitutional government is too weak to survive in a difficult world and urges worried judges and worried citizens to return to acceptance of the security of "sovereign" power. We are earnestly urged to believe that the awesome power sought for the Attorney General will always be used with discretion. Id.

The Court of Appeals, quoting this Court's opinion in Marcus v. Search Warrant, 367 U.S. 717 (1961), called attention to the grave dangers to First Amendment rights resulting from the Government's claim of authority in the interest of national security to conduct unrestricted searches and seizures of conversations. App. 60-61.

The Court thus affirmed that the Executive must be bound by the warrant requirements of the Fourth Amendment.

But what we cannot conceive is that in the midst of the turmoil of the present day, the courts of the United States should suspend an important principle of the Constitution. The very nature of our government requires us to defend our nation with the tools which a free society has created and proclaimed and which, indeed, are justification for its existence.

We hold that in dealing with the threat of domestic subversion, the Executive Branch of our government, including the Attorney General and the law enforcement agents of the United States, is subject to the limitations of the Fourth Amendment to the Constitution when undertaking searches and seizures for oral communications by wire. App. 62-63.

The Court affirmed that disclosure was indeed mandated by Alderman v. United States, 394 U.S. 165 (1969), and further stated that "disclosure may well prove to be the only effective protection against illegal wiretapping available to defend the Fourth Amendment rights of the American public." App. 67-68.

The Government thereupon petitioned this Court for a Writ of Certiorari to review the judgment of the Court of Appeals. Certiorari was granted on June 12, 1971. App. 88. The Defendant-Respondents were granted leave to proceed in forma pauperis.

The same issue of the President's authority to conduct warrantless national security surveillance has arisen in at least eleven criminal prosecutions. The cases known to Respondents are collected in Appendix A. The records in these cases evidence a testing of various formulations for the same claim of power, similar to that of the record in the courts below in this case.

# SUMMARY OF ARGUMENT

There are certain cases in the history of this Court which touch the "bedrock of our political system," Reynolds v. Sims, 377 U.S. 533 (1964). These cases which involve "the very essence of constitutional liberty and security," Boyd v.

United States, 116 U.S. 616, (1885) invoke the historic role of this Court as "the ultimate interpreter of the Constitution," Marbury v. Madison, 1 Cranch 137 (1803), Baker v. Carr, 369 U.S. 186 (1962), Powell v. McCormack, 395 U.S. 486 (1969). These cases call upon this Court, at the crossroads of our history, to stand resolutely as an "impenetrable bulwark against every assumption of power" which threatens the fundamental liberties of the people. James Madison, 1 Annals of Congress 439, New York Times Co. v. United States, 403 U.S. 713, 719 (1971). This is once again, such a case.

- 1 -

The sweeping constitutional issues in this case arise out of an extraordinary claim of power asserted by the Executive which is awesome in its implications for the future and safety of the Republic. The Government seeks the approval of this Court for a claim of unlimited power to engage in wholesale wiretapping of American citizens without regard for the commands of the Fourth Amendment of prior judicial approval by a neutral and detached magistrate, a showing of probable cause and the requisite particularity, whenever in his sole judgement the political activities of these citizens or their organizations may constitute a threat to "the existing structure of the government." App. p. 200. This claim of unlimited executive power is without foundation in the Constitution, the decisions of this Court or the traditions and values of a free people.

(a) The "narrow" position the Government argues—whether a warrant issued by a "neutral and detached magistrate" Coolidge v. New Hampshire, 403 U.S. 443, is required—rejects the "point of the Fourth Amendment," Johnson v. United States, 337 U.S. 10. It has been totally repudiated by the most recent and authoritative decisions of this Court. Coolidge v. New Hampshire, supra; Alderman v. United States, 394 U.S. 165 (1969); Katz v. United States, 389 U.S. 347 (1967). The Court's opinion in

Coolidge is entirely dispositive in rejecting the Government's contention that "the neutral and detached magistrate required by the Constitution," 403 U.S. at 453, can be bypassed merely on the unreviewable determination of the Attorney General that a concededly "domestic" organization of citizens is in some vague way a threat to the "existing structure of the government" (App. 200). The Government seeks to sustain this unprecedented bid for arbitrary power by a "balancing" process which on examination reveals a sweeping intrusion into the privacy of thousands of citizens through a system of political espionage and surveillance which stands condemned by our traditions and values balanced against a supposed "inherent" power of the Executive to suspend constitutional guarantees whenever, in his sole opinion, the "national interest" required it, an "inherent" power which in the words of Justice Story would "clothe him with an absolute despotic power over the lives, the property and the rights of the whole people," a claim to power rejected by this Court in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 713 (1952) and only recently in New York Times Co. v. United States, 403 U.S. 713 (1971). This claim of Executive power is based on the same arguments of "necessity" and "reasons of state" which were made by the agents of George III in justifying the infamous general searches and writs of assistance out of the struggle against which, the "child Independence was born," Boyd v. United States, supra.

Furthermore, the supposed limitations the Government suggests on this claim of arbitrary power are totally illusory. The "standard" the Attorney General has used to exercise this vast power in this case—"attempts of domestic organizations to attack and subvert the existing structure of the Government"—fails to meet the most elementary tests of either the Fourth or First Amendments as to precision and particularity. Baggett v. Bullitt, 377 U.S. 372 (1964), Shelton v. Tucker, 364 U.S. 479 (1960). It is a standard of such extraordinary overbreadth and vagueness as to operate as a dragnet having the dangerous potential

of inhibiting "the exercise of individual freedoms affirmatively protected by the Constitution," Baggett v. Bullitt, supra. Nor is the "extremely limited" judicial review the Government suggests any safeguard at all against the arbitrary power it claims. To the contrary the "judicial review" proposed is wholly non-existant, and as in the 18th Century, the Executive's claim is in fact one of arbitrary power uncontrolled by any meaningful judicial review at all.

In short, the Executive argues here for a sweeping power to institute in this country a system of domestic political espionage which a constitutional authority of the past has characterized as "the heart of the administrative system of continental despots." May, Constitutional History of England. Such a system in the words of this Court, is the "hall-mark of a police state." Shuttlesworth v. Birmingham, 382 U.S. 87 (1969) and offends against the "very essence of constitutional liberty and security" Boyd v. United States, supra.

(b) The claim of power of the Executive would sanction general searches without prior judicial authorization, a showing of probable cause or a requirement of particularity in total violation of the Fourth Amendment. This claim of Executive power would resurrect the infamous arbitrary searches authorized by the general writs of assistance which kindled the struggles of the 18th Century out of which the independence of the Nation was born. Boyd v. United States, supra. The dragnet nature of the electronic surveillance proposed here, without warrant, without showing of probable cause and without meeting the requirement of particularity violate the Fourth Amendment as interpreted by the many decisions of this Court. See for example Boyd v. United States, supra; Katz v. United States, supra; Berger v. New York, 388 U.S. 41 (1967); Alderman v. United States, 394 U.S. 165 (1969). It offends against the spirit of the history of the struggles against arbitrary Executive power that shaped the Fourth Amendment. Boyd v. United States, supra; Marcus v. Search Warrant 367 U.S. 717 (1961); Stanford v. Texas, 379 U.S. 476 (1965). To sustain the Executive's claim would reintroduce into American life what James Otis called in his historic argument before the Massachusetts Court in 1766, "the worst instrument of arbitrary power." Boyd v. United States, supra.

- (c) In order to justify its unprecedented reach for power, the Government once again has invoked the doctrine of "inherent" power in the Executive which sanctions the suspension of constitutional requirements when this is deemed necessary in his sole judgement. As the Court below found, this claim of power was decisively rejected by this Court in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952). This Court has time and again, from Ex Parte Milligan 4. Wall. 2 (1866) to the decision last Term in New York Times Co. v. United States, 403 U.S. 713 (1971), rejected the "talismanic" use of "national security," or the "war power" to sanction the evasion of fundamental constitutional guarantees.
- (d) The claim of power made here by the Executive offends against the fundamental principles of separation of powers and limited sovereignty established in the first days of the Republic. The doctrines advocated here would "subvert the very foundations of all written Constitutions," Marbury v. Madison, supra, at 178. The history of the nation teaches that the system of separate branches of government with specific enumerated powers, restricted by the Bill of Rights, was designed to eliminate forever from the newly established Republic the dangers of arbitrary Executive power which the present claim of the Executive would reintroduce into American life.
- (e) The last minute efforts of the Government to interject considerations of "foreign security" into this case in order to sustain the legality of these warrantless wiretaps, are totally unsupported by the record. The Affidavit of the Attorney General filed in the District Court explicitly states that the electronic surveillances at issue were directed solely toward "domestic organizations." In the Court of Appeals the Government specifically denied that the surveillances

were in any way related to attempts "to gather 'foreign intelligence' information" or to "gather information relating to attempts of a foreign power to overthrow our Government." The last minute attempt in this Court to interject "foreign security considerations," Government Brief at 30, n. 13, reflects a desperate attempt to camouflage the illegality under the Fourth Amendment of the warrantless surveillances involved here. Furthermore, the Government is attempting to bootstrap its unprecedented claim of Executive power to set aside constitutional limitations in the area of domestic alleged "subversion," whatever that broadly sweeping term means, upon a "foreign security" exception to the Fourth Amendment, which has not even been acknowledged by this Court, see Katz v. United States, supra, and in any event relates only to narrow foreign security questions not involved in this case, see Giordano v. United States, 394 U.S. 310, 314 (1969).

#### - II -

The Executive's claim of unlimited power to engage in general searches into the words, ideas and thoughts of citizens violates the First Amendment to the Constitution. As the lower Court has pointed out, "the First Amendment is the cornerstone of American freedom [and] the Fourth Amendment stands as guardian of the First." App. 61. The Executive has already opened up a broad program of warrantless surveillance against the widest spectrum of political opposition to the present administration. See App. A to this Brief. These activities generate a climate in which "feat of internal subversion," Coolidge v. New Hampshire, supra, operates to chill the exercise of the "delicate and vulnerable" freedoms of the First Amendment, NAACP v. Button, 371 U.S. 415. The Attorney General's proposed program of "investigative" warrantless wiretapping of any citizens or organizations which in his judgement threatens to "subvert the existing structure of government." unrelated to any actual criminal conduct, no less any clear and present dan-

ger of serious substantive evil, violates the most fundamental teachings of this Court in respect to the First Amendment. Brandenburg v. Ohio, 395 U.S. 44 (1969); Cf. Whitney v. California, 274 U.S. 357 (1927) (concurring opinion of Justice Brandeis). Moreover, the standard the Executive seeks to use is the most imprecise, overly broad and vague standard ever to reach this Court for review. See Baggett v. Bullitt, 377 U.S. 360 (1964). It will "broadly stifle fundamental personal liberties" Shelton v. Tucker, 264 U.S. 479 (1960). It "lends itself to selective enforcement. against unpopular causes," NAACP v. Button, supra, and "may easily become a weapon of oppression." NAACP v. Button, supra. As in New York Times Co. this last Term, the claim of the Executive, if sustained, "would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make secure."

#### - III -

The Executive's claim of power is not authorized, sanctioned or recognized by any act of Congress and in particular not by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as the Government argues. Quite to the contrary, the clear meaning of the entire statutory scheme in Title III indicates the intention of Congress to prohibit all electronic surveillance except in the narrowly defined circumstances of the Statute. Furthermore, the Government's argument that the vague words of Section 2511 (3) of the Act in some way "recognizes" warrantless national security wiretapping is entirely without merit. The Act carefully spells out the methods by which warrante may be obtained for all conceivable "national security" situations which might arise, even providing for emergency situations in Section 2518 (7). As the Court below pointed out, the vague language of 2511(3) "is not the language used for a grant of power," App. 57, but at best was "clearly designed to place Congress in a completely neutral position in the very controversy with which this case is concerned" App. 57. To read the vague words of 2511 (3) as a "recognition" of the Executive's claim in this case, would be to render the statute patently unconstitutional. Aptheker v. United States, 378 U.S. 500 (1963); Shelton v. Tucker, NAACP, v. Button, supra.

- IV -

The Government urges, in the event the Court rejects its sweeping claim for power, that the Court should reconsider its constitutional holding in Alderman v. United States, 394 U.S. 165 (1969) only two years ago, that conversations overheard by illegal surveillance, to which defendants have standing to object, must be disclosed for the purpose of an adversary hearing on relevance. This Court should not reconsider its decision on this question in Alderman. The fundamental principles of liberty embodied in the Fourth Amendment require the protection of the salutory impact of the Court's thoughtful conclusions in Alderman. Alderman is a constitutional decision of great importance. It vindicates the fundamental principle taught by Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 485 (1928) that "in a government of laws existence of the government will be imperiled if it fails to observe the law scrupulously." In the area of electronic surveillance only disclosure of the contents of illegal surveillance gives defendants-the opportunity to prove that a portion of the case against them is the result of illegal searches and seizures. Coplon v. United States 185 F.2d 629 (2nd Cir. 1951): Alderman v. United States, supra. In our system of law only an adversary proceeding can protect a defendant where illegal surveillance has occurred. Dennis v. United States, 384 U.S. 855 (1966). Once a court has held a surveillance illegal, there is no justification for denying an adversary hearing on relevancy. The Government then has the alternative of obeying the commands of the Constitution or

dropping the presecution, Coplon v. United States; Alderman v. United States, supra. As Judge Hand said so powerfully in Coplon, "a society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism," at 638.

#### **ARGUMENT**

I

THE CLAIM OF THE ATTORNEY GENERAL TO UNLIMITED POWER TO ENGAGE IN WHOLESALE WIRETAPPING OF CITIZENS WITHOUT REGARD FOR THE COMMANDS OF THE FOURTH AMENDMENT WHENEVER IN HIS SOLE JUDGMENT THE NATIONAL INTEREST REQUIRES IT IS DESTRUCTIVE OF THE FUNDAMENTAL PRINCIPLES OF LIBERTY CONTAINED IN THE CONSTITUTION AND THE BILL OF RIGHTS AND THREATENS THE SAFETY AND SECURITY OF THE REPUBLIC

A. The Arguments Advanced by the Executive to Support its Claim of Unlimited Power are Without Foundation in the Constitution, the Decisions of This Court or the Traditions and Values of a Free People

This case brings before the Court a claim of power asserted by the Executive, awesome in its implications for the future and safety of the Republic. At the heart of the Government's position is the bold contention that one man, holding an exalted position, can, in his virtually unreviewable discretion, determine that broad and sweeping electronic surveillance of American citizens can be undertaken by federal police agents totally without regard for the commands of the Constitution whenever this individual decides in his sole judgment that the suspension of historic safeguards of personal liberty enshrined in the mandates of the Bill of Rights is required in the "national interest." Government's

Brief at 6 et seq.<sup>3</sup> Such a position has seldom been urged before this Court by representatives of what has been characterized in proud moments of the past as a "government of laws and not men." Marbury v. Madison, 1 Cranch 137 (1803). And it is accordingly a serious and forboding question for the future of such a system of government that the Executive Branch now asserts before this Court a limitless power to supersede the guarantees of constitutional liberty whenever in their judgment alone the political activities of citizens or their organizations constitute a threat to "the existing structure of the Government." Affidavit of Attorney General, App. 20. This vast power, which the present Administration has already exercised and now asks this Court to sanctify-to conduct wholesale surveillance, through electronic techniques, of the thoughts, ideas, and conversations of citizens in opposition to those currently in power -is, in the warning words of this Court written in striking down governmental conduct which sweeps broadly across the protected freedoms of the people, a "hallmark of a police state." Shuttlesworth v. Birmingham, 382 U.S. 87, 91 (1965) (opinion of Mr. Justice Stewart for the Court). The power which the Executive here seeks sanction for is, as Mr. Justice Frankfulter pointed out in connection with earlier efforts to justify far less extensive executive wiretapping, too reminiscent of recent tyrannies to be permitted in a society whose highest claim to the accolades of history is its deference to the values of human freedom. Cf. Whitney v. California, 274 U.S. 357, 372 (1927) (Mr. Justice Brandeis concurring).

The Executive's claim of a power to brush aside the mandates of the Fourth Amendment, the "neutral and detached

As we have pointed out in the Statement of the Case, the Affidavit of the Attorney General upon which the Executive's claim to power rests, no where invokes the words "national security" as a basis for his authorization of warrantless wiretapping. His refusal to disclose the contents of the interceptions is based, in his words, upon the "national interest."

magistrate required by the Constitution," Cookidge v. New Hampshire, 403 U.S. 443, 453 (1971) (opinion of Mr. Justice Stewart for the Court), the historic requirements of probable cause and particularity born out of the revolutionary struggles of the War of Independence against the styrannical general searches of the officers of the British. king, Olmstead v. United States, 277 U.S. 438 (1928), dissenting opinion of Mr. Justice Brandeis, Berger v. New York, 388 U.S. 41 (1967), reflects a dangerous and growing tendency in some to turn away from the values of personal liberty embodied in the stern mandates of an older day and set forth in the written guarantees of the fundamental law. But this Court sits as the guardian of these values, as we have been only recently reminded in words wholly dispositive of the issues in this case. In his opinion for the Court this last Term in Coolidge v. New Hampshire, supra, Mr. Justice Stewart rejected the assumption underlying the Government's argument here that the "fear of internal subversion" is a "talisman" which can wipe out the values embedded in the Fourth Amendment. Justice Stewart wrote for the Court:

In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagent' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

It is to protect these values that this Court sits, as we were taught by one of the greatest Chief Justices in Marbary. It was in this spirit that the Court below responded

to the claim of the Executive to a power frightening in its implications for the survival of constitutional government. The Court of Appeals formulated its responsibility at such a moment in words which reflected the "highest traditions of this Court," Baker v. Carr, 369 U.S. 186, 262 (opinion of Mr. Justice Clark).

During more difficult times for the Republic than these, Benjamin Franklin said: 'They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.' It is the historic role of the judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest; the Constitution of the United States remains the supreme law of our land. No one proclaimed this message with more force than did one of the first and greatest Chief Justices of the United States. App. 33.

The position which the representatives of the government now urge before this Court underscores the conclusion of the Court below that this is indeed one of those periods of crisis, "when the challenge to constitutional liberties is the greatest." The government advances a claim of power, incredibly characterized as a "narrow" constitutional issue, Government's Brief at 9, that would erase the Fourth Amendment, cf. Coolidge v. New Hampshire, supra, ignore the First Amendment, cf. New York Times v. United States, 403 U.S. 713 (1971) and override the first principles of a constitutional government of limited powers and separation of functions, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) in order to sanction a system of wholesale surveillance and espionage over the lives of American citizens. Unless this claim of power is forthrightly repudiated by this Court, our nation will move inevitably into the shadow of that "tyranny and oppression" Justices Brandeis and Holmes warned against in their classic opinions condemning the "dirty business" of wiretapping. Olmstead v. United States, 277 U.S. 438, 469, 471.

1. The government's claim of limitless power to disregard in the sole discretion of one man, the most fundamental guarantees of personal liberty comes to the Court encased in a carefully constructed series of ingenious rationalizations designed to mask and camouflage the awesome implications of its bid for vast and uncontrolled power over the lives of the people of this country. The opening thrust in the argument is an astounding attempt to reassure the Court that all that is involved in this grasp for unprecedented power is a "narrow" issue-namely whether the admitted absence of a warrant representing the judgment of a "neutral and detached magistrate" Coolidge v. New Hampshire, supra, at 452, authorizing the wiretapping of a concededly purely domestic organization of American citizens [see Affidavit of Attorney General, App. p. 20] is a relatively minor matter unaffecting the constitutional legality of the surveillance when "balanced" against the Attorney General's judgment that the wiretapping was in the "national interest." See Affidavit of Attorney General, App. 20-21.

This assertion is hardly a "narrow" question. It totally rejects what this Court has again and again taught is the "point of the Fourth Amendment," see Johnson v. United States, 333 U.S. 10, 13-14 (1948) (opinion of Mr. Justice Jackson); Coolidge v. New Hampshire, supra at 449 (opinion of Mr. Justice Stewart). It blandly declines to accept what this Court has only this last Term reminded the country is "the most basic constitutional rule in this area." Coolidge v. New Hampshire, supra at 454.

The simple fact of the matter is that the position now urged by the Executive, the claim of power sought to be vindicated, has been decisively rejected by the most recent and authoritative decisions of this Court. Coolidge v. New Hampshire, supra, (opinion of Mr. Justice Stewart for the Court); Alderman v. United States, 394 U.S. 165 (1969) (opinion of Mr. Justice White for the Court); Katz v. United States, 389 U.S. 347 (1967) (opinion of Mr. Justice Stewart

for the Court); New York Times Co. v. United States, 403 U.S. 713 (1971):

The government argues here that where the Attorney General, acting for the President, determines that the "national interest" requires it, the Fourth Amendment may be read, in a situation like the one presented by this record. of an organization concededly "domestic" in character (see Affidavit of Attorney General, App. 20-21), as not requiring prior judicial approval of any electronic surveillance. The opinion of the Court last Term in Coolidge v. New Hampshire is entirely dispositive in rejecting this contention. In Coolidge, in his opinion for the Court, Mr. Justice Stewart reminded us once again that the command that a warrant be issued by the "neutral and detached magistrate required by the Constitution," 403 U.S. at 453, is at the very heart of the Fourth Amendment. In words which directly repudiate the Executive's attempted deletion of the warrant requirement from the Amendment, Justice Stewart found it instructive to restate once again the incisive analysis of Mr. Justice Jackson which underlies the recent decisions of the Court enforcing the mandates of the Fourth Amendment:

> 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a police

man or government enforcement agent.' Cf. United States v. Lefkowitz, 285 U.S. 452, 464; Giordenello v. United States, supra, at 486. Wong Sun v. United States, 371 U.S. 471, 481-482; Katz v. United States, 389 U.S. 347, 356-357.4

This analysis of the "most basic constitutional rule in this area" *Id.* at 454, was forcefully stated in *Katz v. United States*, 389 U.S. 437 (1967) (opinion of Mr. Justice Stewart):

Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' Agnello v. United States, 269 U.S. 20, 33, for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer... be interposed between the citizen and the police....' Wong Sun v. United States, 371 U.S. 471, 481-482. 'Over and again this Court has emphasized

As for the proposition that the existence of probable cause renders noncompliance with the warrant procedure an irrelevance, it is enough to cite Agnello v. United States, 269 U.S. 20, 33, decided in 1925: 'Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.' See also Jones v. United States, 357 U.S. 493, 497-498; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392. ("[T]he rights . . . against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way.")

Perhaps recognizing that approval of the wiretapping here by the Attorney General, the chief federal prosecuting agent, hardly meets the constitutional requirement of "the requisite neutrality" which is "the whole point of the basic rule so well expressed by Mr. Justice Jackson," 403 U.S. 450, the Government attempts to suggest that in some way the search here involved was otherwise "reasonable" within the meaning of the Amendment. We discuss at some length hereafter the fact that this search met none of the requirements of the Amendment, neither the requirement of probable cause, nor the requirement of particularity. See Point I-B infra. But in any event this Court in Coolidge sharply rejected any such argument which would wish away the requirement of a prior judicial approval:

that the mandate of the Fourth Amendment requires adherence to judicial processes, United States v. Jeffers, 342 U.S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. 389 U.S. 347, 357 (1967).

This decision of the Court in Katz, once again emphasizing the historic concept of the Fourth Amendment that the judgment of a "neutral and detached magistrate" that the search is permissible is the very "point" of the Amendment, 403 U.S. 449, disposes of any possible argument that the electronic surveillance involved in this case falls within any of these "few specifically established and well-delineated exceptions" 389 U.S. 347, 357. The Government dares not even attempt to argue that any of these exceptions apply.5 The Executive's position is more devious. In the guise of urging a "new" exception unfounded in either the past decisions of the Court or the history of the Amendment, the present administration seeks to wipe out the Amendment itself in those areas of national life in which it was born and originally designed to be most crucial-the areas of militant and active political opposition to the holders of power. See Stanford v. Texas, 379 U.S. 476 (1965); Marcus v. Search Warrant, 367 U.S. 717 (1961). In the name of the "national interest," by invoking a fear of internal "threat" to the "existing structure of the government," Affidavit of Attorney General, App. 20, the Executive seeks to obtain from this Court a sanction of the suspension of traditional

<sup>&</sup>lt;sup>5</sup>In Coolidge the Court pointed out that:

The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption... that the exigencies of the situation made that course imperative.' [T]he burden is on those seeking the exemption to show the need for it.' 403 U.S. at 443.

We discuss these exceptions to the constitutional requirement of a prior judicial warrant at Point I-B infra.

constitutional protections in the most sensitive areas of national life. But this Court has only last Term repudiated such attempts to undermine the values of "the authors of our fundamental constitutional concepts" through playing upon the "fear of internal subversion." Pointing out that these "times of unrest" are "not altogether unlike" the days when those who wrote out fundamental law won "by revolution on this continent—a right of personal security against arbitrary intrusions by official power," this Court in Coolidge last year reminded the nation that these values served by the Fourth Amendment, at the heart of which is the requirement of a "neutral and detached magistrate," have become, in the Court's words "more, not less, important." Coolidge v. New Hampshire, 403 U.S. at 443. Cf. New York Times v. United States, supra.

And in words which are so appropriate here this Court warned that "we must not lose sight of the Fourth Amendment's fundamental guarantee." 403 U.S. at 453. To the arguments, similar to those of the Government here, which assert that it is after all only a "narrow" deviation from constitutional requirements that is sought, in the time-old name of "expediency" or "national interest," the Court in Coolidge responded by restating its powerful and incisive warning of 100 years ago:

Mr. Justice Bradley's admonition in his opinion for the Court almost a century ago in *Boyd v. United* States, 116 U.S. 616, 635, is worth repeating here:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. 403 U.S. at 453-54.

It is within this mandate, the high duty of this Court "to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," Boyd v. United States, 116 U.S. 616, 635 (1885), that the claim of power of the Executive in this case must be carefully examined.

2. The essence of the executive's extraordinary position in this case is a legal sleight of hand in which the traditional "values" of the Fourth Amendment, Coolidge v. New Hampshire, supra, vanish in a "balancing" process in which new values, rejected by those who-wrote the Constitution, replace those of the Founders. In a truly incredible passage the Executive suggests that the central value of the right of each person to "security against arbitrary intrusions by official power," Coolidge v. New Hampshire, 403 U.S. at 455 is "outweighed" here because the surveillance involved is a "lesser invasion" of the privacy of citizens, Government's Brief at 13. We do not feel that it is necessary in this Mr. Justice Court to argue extensively on this question. Brandeis' prophetic words in his landmark opinion in Olmstead v. United States, 277 U.S. 438, 476 (1928), are sufficient to respond to the suggestion that wiretapping is a "lesser invasion" of privacy. Id. The Justice wrote almost fifty years ago, "as a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping." 277 U.S. at 476. These words of prophecy of Justice Brandeis today reflect the reality of the world about us. One hundred years ago one of England's most eminent constitutional historians, Sir Erskine May, described the deadly effect of a system of political espionage and surveillance upon a society:

Next in importance to personal freedom is immunity from suspicions and jealous observation. Menmay be without restraints upon their liberty; they

may pass to and fro at pleasure; but if their steps are tracked by spies and informers, their words noted down for crimination, their associates watched as conspirators—who shall say they are free? Nothing is more revolting to Englishmen than the espionage which forms the heart of the administrative system of continental despots. It haunts men like an evil genius, chills their friendships, and blights their domestic hearth. The freedom of a country may be measured by its immunity from this baleful agency. May, Constitutional History of England, 275 (1813).

The words of this English historian a century ago strike home today in contemporary America, if our "freedom" is to be "measured by its immunity from this baleful agency." Id. We are already as a people at the point at which the "classic balance of privacy and surveillance has been upset." Westin, Privacy and Freedom (1966). In a thoughtful essay warning of the danger to the existence of a democratic society flowing from the impact of the type of surveillance the Government admits to conducting, Circuit Judge Kiley of the Court of Appeals for the Seventh Circuit spoke of:

the danger too, noted by Professor Westin, that surveillance of individual and group conduct—a primary means of social control—can be carried to lengths that seriously impair freedom' in democracy. In support of this view, it seems enough to contemplate the spectre of a Big Brother observing how we think, feel and act, and the oppressive moral and political climate that would tend to suffocate our freedom. Kiley, "Privacy's Last Stand," 26 The Critic, 41 (1967).

It is monstrous to characterize the sweeping surveillance the Government seeks to sustain, as a "lesser invasion" of the privacy of citizens. Like the system of political espionage which Sir Erskine May a century ago condemned as being at "the heart of the administrative system of continental despots," the spectre of widespread domestic surveillance over the lives, the words, the thoughts of American citizens, haunts American life today to a degree unknown in our

history. Few can disagree today with the sober warning words of Mr. Justice Douglas in 1966 in Osborn v. United States, 385 U.S. 323 (1966):

The time may come when no one can be sure whether his words are being recorded for use at some future time; when everyone will fear that his most secret thoughts are no longer his own, but belong to the Government; when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy. and with it liberty, will be gone. If a man's privacy can be invaded at will, who can say he is free? If his every word is taken down and evaluated, or if he is afraid every word may be, who can say he enjoys freedom of speech? If his every association is known and recorded, if the conversations with his associates are purloined, who can say he enjoys freedom of association? When such conditions obtain, our citizens will be afraid to utter any but the safest and most orthodox thoughts; afraid to associate with any but the most acceptable people. Freedom as the Constitution envisages it will be vanished. 385 U.S. at 353-54 (dissenting opinion).

If the surveillance the government seeks to sanctify is permitted, if the privacy of citizens to their innermost thoughts is allowed to rest in the hands of one man's uncontrolled iudgment, it will become necessary to say of Americans, as May said a hundred years ago of the subjects of "continental despots," "who shall say they are free?". The recent history of the contemporary world sadly demonstrates over and again that a system of broad surveillance of a political opposition, always masked in terms of protection against a "threat" to existing government, is an ominous and frighten ing "hallmark of a police state." Shuttlesworth v. Birmingham, supra. It is no "lesser" invasion of the privacy of citizens. In a fantastic inversion of values the government suggests that this "lesser" invasion of privacy which its program of domestic political surveillance would entail, is after all a "protection of the fabric of society itself." Government's

Brief at 14. But the "fabric of society," Id., which "the authors of our fundamental constitutional concepts" wove, Coolidge v. New Hampshire, at 455, was not a society in which the personal liberties of the people would rest upon the grace or judgment of one official unfettered by the written mandates of the fundamental law. As Justice Brandeis taught, "those who our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." Whitney v. California, 274 U.S. at 375 (concurring opinion of Mr. Justice Brandeis). The "fabric of society," which the Founders created had enmeshed in its threads an understanding which James Madison, one of the "authors of our fundamental constitutional concepts," Coolidge v. New Hampshire at 455, set forth in uncommonly blunt words most appropriate and relevant here in considering the Government's claim that the Attorney General can ignore, at his will, the constitutional restrictions of the Fourth Amendment:

The preservation of a free government requires not merely that the metes and bounds which separate each department of power may be invariably maintained; but especially that neither of them be suffered to overleap the great barrier which defends the rights of the people. The rulers who are guilty of such an encroachment exceed the commission from which they derive their authority and are tyrants. The people who submit to it are governed by laws made neither by themselves nor by an authority derived from them and are slaves. Madison, Memorial and Remonstrance, Vol. II, Writings of Madison, 183-191 (G. Hunt, ed., 1901). See Walz v. Tax Commission, 397 U.S. 694 (May 4, 1970, opinion of Mr. Justice Douglas).

A doctrine which would permit a prosecuting officer, the Attorney General, to "overleap the great barrier which defends the rights of the people," Id., when in his own judgment it is necessary to do so to protect the national interest would destroy, not protect, the "fabric of society" itself. In Madison's harsh words rulers who seek to assert

such a power "are tyrants" and people who submit to such power "are slaves."

'In the cauldron of "balancing" in which the constitution protections of the Fourth Amendment are melted away, the Government then seeks to weigh the "lesser" impact of its domestic surveillance program against the "weighty" considerations of the scope of powers claimed to be vested in the President, and through him the Attorney General, by Article II, Section 1 of the Constitution "to preserve, protect and defend the Constitution and the government created by it." Government's Brief at 13. The Government seeks to infer from this grant of executive authority certain "inherent" powers6 sufficient to allow the suspension of Fourth Amendment requirements in the area of "domestic" national security, however broadly that term may sweep. But we have been taught from Marbury v. Madison, supra to Powell v. McCormack, 395 U.S. 486 (1969), from Ex Parte Milligan, 4 Wall. 2(1866) to Youngstown Sheet and Tube Co., supra, and only this last June in New York Times v. United States, supra, that the obligation placed upon the nation's branches of government to "preserve", protect and defend the constitution" does not authorize men in high places to suspend or ignore the Constitution. This is, as we are constantly reminded by this Court, a "government of. laws and not men." Marbury v. Madison, supra. From the earliest days of the Republic those who fashioned the fundamental principles designed to guide this new experiment

In the lower courts and more recently in their answering brief in the Court of Appeals for the Seventh Circuit (United States v. Dellinger #18295) served on November 30, 1971, the Government has expressly asserted that the President "possesses certain inherent powers" which support the claim of power exercised here. In this Court the Government assiduously avoids the use of the term "inherent powers" perhaps because of the forceful rejection of that concept as a basis for evading the commands of the First Amendment in the recent opinions in New York Times v. United States, 403 U.S. 713 (1971). The rationale urged is however the same absent the offending terminology.

in constitutional government were fearful of the centralization of arbitrary power in the hands of the executive. Justice Story, who sat with John Marshall on the Court that shaped the contours of our constitutional law wrote in his famous Commentaries a passage analyzing the powers of the President that reads as if it were written to rebut the theories advanced by the present representatives of the executive branch to justify an assumption of power in derogation of the rights of the people, without express sanction in the Constitution or the laws of the land:

- § 291. Another duty of the President is, "to take care that the laws be faithfully executed." And by the laws we are here to understand, not merely the acts of Congress, but all the obligations of treaties, and all the requisitions of the Constitution, as the latter are, equally with the former, the "supreme law of the land." The great object of the establishment of the executive department is, to accomplish, in this enlarged sense, a faithful execution of the laws. Without it, be the form of government whatever it may, it will be utterly worthless for confidence, or defence, for the redress of grievances, or the protection of rights, for the happiness and good order of citizens, or for the public and political liberties of the people.
- § 292. But we are not to understand, that this clause confers on the President any new and substantial power to cause the laws to be faithfully executed, by any means, which he shall see fit to adopt, although not prescribed by the Constitution, or by the acts of Congress. That would be to clothe him with an absolute despotic power over the lives, the property, and the rights of the whole people. A tyrannical President might, under a pretence of this sort, punish for a crime, without any trial by jury, or usurp the functions of other departments of the government. Story, A Familiar Exposition of the Constitution of the United States, New York, 1856, p. 177-178.

The power the Attorney General here claims, in the name of the President is "prescribed" neither in express terms by the Constitution nor by the acts of Congress. See Point II. infra. The government seeks to infer the sweeping authority claimed from some source of power "inherent" in the role of the Presidency. But as Justice Story pointed out, to find within the constitutional powers of the Executive sanction to use "any means which he shall see fit to adopt" would be "to clothe him with an absolute despotic power over the lives, the property and the rights of the whole people." Those who wrote the Constitution and its Bill of Rights were too close to the struggle against the British monarch to tolerate a structure of government in which the executive could indefinitely expand its control over the citizenry through a theory of undefined, uncontrolled "inherent" powers. Justice Story reflected this deep concern when he wrote:

No man, who has ever deeply read the human history, and especially the history of republics, but has been struck with the consciousness, how little has been hitherto done to establish a safe depositary of power in any hands; and how often, in the hands of one, or a few, or many,—of an hereditary monarch, or an elective chief, or a national council, the executive power has brought ruin upon the state, or sunk under the oppressive burden of its own imbecility. Perhaps our own history has not, as yet, established, that we shall wholly escape all the dangers; and that here will not be found, as has been the case in other nations, the vulnerable part of the republic. Story, supra at p. 159.

Justice Story's words were deeply prophetic and "our own history" has not "wholly escape[d] all the dangers" of excessive executive power. But at each crucial point in our history when the theory of "inherent" executive power has threatened to engulf our constitutional liberties this Court has courageously rejected the concept and has reaffirmed the fundamental principles of republican government.

In Ex Parte Milligan, 4 Wall. 2 (1866) at the end of the Civil War, in Youngstown Sheet and Tube Co. v. Sawyer. 343 U.S. 579 (1952) in the difficult first years of the cold war: and only this last Term in New York Times v. United States, 403 U.S. 713 (1971) in these turbulent days of our most protracted and unhappy colonial war, this Court has consistently repudiated any effort to suspend fundamental constitutional concepts and protections in the name of a claimed national "necessity." In Milligan the Court bluntly warned that "no doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." 4 Wall, at 121. To the argument here advanced by the Executive that it would "frustrate" the purposes behind its program of wholesale surveillance to submit its claims to the "independent magistrate required by the Constitution," Coolidge v. New Hampshire, supra, Mr. Justice Frankfurter responded in 1952 to a similar contention in words which should have destroyed this rationale for arbitrary power for all time:

A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 613 (concurring opinion).

And to the ultimate contention of the Executive here that the President has an "inherent power" to abrogate fundamental provisions of the Constitution in the name of "national security," only this last Term the late Mr. Justice Black responded with words which will be remembered long in the annals of this Court:

To find that the President has 'inherent power' to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make secure.

... The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. New York Times Co. v. United States, 403 U.S. 717 719 (1971) (concurring opinion).

The decision of this Court in New York Times, and the concurring opinions of Justices Douglas, Black, Brennan, Stewart, White and Marshall are totally dispositive here. As in New York Times, to find that the President has "inherent power" to disregard the very heart of the Fourth Amendment, the requirement of prior judicial approval of a search and seizure by a detached and impartial magistrate, would "wipe out the Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make secure." 403 U.S. at 719.

3. Perhaps more so than in any other case brought to this Court in recent years the teaching of Mr. Justice Holmes that a "page of history is worth a volume of logic," New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1925), is decisive here. This Court has reminded us again and again that "in order to ascertain the nature of the proceedings intended by the Fourth Amendment . . 'it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England." Boyd v. United States, 116 U.S. 616, 625 (opinion of Mr. Justice Bradley). The struggles in the colonies against the "arbitrary claims of Great Britain" culminating in the historic argument of James Otis against the writs of assistance, the "worst instrument of arbitrary power," 116 U.S. at 625, was in Justice Bradley's opinion, "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." 116 U.S. at 625. This was the struggle which evoked those

incisive and famous words of John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." 116 U.S. at 652. What is little recognized is that these first American struggles against executive oppression were then the inspiration for those events in England culminating in the great cases, Entick v. Carrington, 19 Howell's State Trials 1029 (1765), Leach v. Three of the King's Messengers, 19 Howell's State Trials 1002 (1765), Wilkes v. Wood, 19 Howell's State Trials 1154 (1763), which have been characterized by this Court as "one of the permanent monuments of the British Constitution . . . a monument of English freedom . . . the true and ultimate expression of constitutional law whose propositions were in the minds of those who framed the Fourth Amendment.' 116 U.S. 626, 627.

The central thread of this history which shaped and "framed" the Fourth Amendment was the rejection and repudiation of precisely those arguments which the representatives of the Executive argue now to this Court in support of their claim for power. In Boyd, Mr. Justice Bradley refers us to the authoritative discussion of this history in Professor Cooley's famous Constitutional Limitations, 116 U.S. at 625 (Note by the Court). Professor Cooley points out the lessons of this "page of history," New York Trust Co. v. Eisner, supra, when he reminds us that "if in English history we inquire into the original occasion for these constitutional provisions [Fourth Amendment], we shall probably find it in the abuse of executive authority, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals in order to obtain evidence of political offenses either committed or designed." Cooley's Constitutional Limitations, Vol. I, Chap. x, p. 612 (8th Edition, 1927). (Emphasis added).

The abuses of "executive authority" at the center of the colonial and British struggles, were justified then as today, by claims of necessity, national interest, or to use the phrase of the 18th century, "reasons of state." The representatives of the crown, both before the Massachusetts Court in re-

sponse to the arguments of James Otis, and in the mothercountry in defense to the damage actions brought by the outraged victims of the general warrants issued by the secretaries of state, argued that "the safety of the realm," that the "necessities of state," urgently justified these broad sweeping powers asserted by the executive officers in the name of the King. Further they argued that these executive warrants were "expeditious" procedures required to prevent the "grave" injuries to the state caused by seditious libels which "threatened" to "overthrow" the existing "system of government."7 And in earnest justification for the use of this power the representatives of the crown pleaded a century of "prior usage" by the Executive.8 These arguments for "arbitrary power" cf. Boyd v. United States, supra, were analyzed, considered and bluntly rejected in the 18th Century English cases which shaped the contours of the Amendment. At the very center of the rea-

<sup>&</sup>lt;sup>7</sup>The representatives of the crown, in defense to the damage actions brought by the outraged victims of the general warrants issued by the secretaries of state, argued that "reasons of state" and the necessity to protect against "offences against government and the public peace" that "effectually undermine government" urgently justified these broad sweeping powers asserted by the executive officers in the name of the King. See the arguments of the Solicitor General, Leach, supra at 1012-20; Entick, supra at 1039-41; Wilkes, supra at 1158-60. The executive insisted that "this power is essential to government, and the only means of quieting clamours and sedition." Entick, supra at 1064. And in earnest justification for the continued use of this power, the representatives of the crown pleaded its prior "usage tolerated... and continued" for a century. Entick, supra at 1067; Wilkes, supra at 1167.

The government here pleads "prior usage" in a similar fashion as a justification for the claim of power asserted. The response of the English courts that prior illegality does not sanction present conduct, see for example Entick v. Carrington, supra, is very similar to the position of this Court recently in Powell v. McCormack, 395 U.S. 486. (1969), rejecting the contention that past unconstitutional practices of the House of Representatives in excluding members elect, could in any way sanction or justify a present unconstitutional exclusion.

soning which led to the fashioning of those principles of liberty which have become a "monument" of freedom, 116. U.S. at 625, was the express recognition that it is precisely when "reasons of state," of "national interest" are asserted, cf. Affidavit of Attorney General, that the liberties of the people may not be left to the sole discretion of representatives of the sovereign. Thus in Entick v. Carrington, supra, Lord Camden rejected directly the rationalization of executive power that invokes "national interest" or "reasons of state" as a talisman designed to erase the protective barriers of probable cause, particularity, and the prior determination of an impartial magistrate. In 1765 Lord Camden wrote in words which dispose of the contention of today's advocates of sweeping executive power, the representatives of the government in this appeal:

It is then said, that it is necessary for the ends of government to lodge such a power with a state officer; and that it is better to prevent the publication before than to punish the offender afterwards. I answer, if the legislation be of that opinion, they will revive the Licensing Act. But if they have not done that, I conceive they are not of that opinion. And with respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.

Serjeant Ashley was committed to the Tower in the 3d of Charles 1st, by the House of Lords only for asserting in argument, that there was a 'law of state' different from the common law; and the Ship-Money judges were impeached for holding, first, that state-necessity would justify the raising money without consent of parliament; and secondly, that the king was judge of that necessity.

If the king himself has no power to declare when the law ought to be violated for reason of state, I am sure we his judges have no such prerogative. Entick, supra at 1073.

The bold powerful words of Lord Camden two centuries ago cut to the heart of the Government's arguments here. If "the king himself has no power to declare when the law ought to be violated for reason of state" neither does the present Executive or his representative, the Attorney Gen-The English experience out of which the Fourth Amendment emerged rejects out of hand the invocation of "national interest" or "state necessity" as a justification for ignoring the protections to liberty which the Amendment incorporates. To use the words of the recent decision in Coolidge, history teaches that the word national security "is not a talisman in whose presence the Fourth Amendment fades away and disappears" 403 U.S. at 461, 462. Doctrines of "reasons of state" and "state necessity" have throughout history been the justification advanced for the exercise of arbitrary power. The great struggles for liberty in the 18th century that were our constitutional heritage stand today as a reminder that the preservation of individual freedoms depends often upon courageous judges who stand resolute against the "pernicious doctrines" which would undermine the protections of the constitution. Ex Parte Milligan, supra.

4. Perhaps conscious of this deep rooted aversion in our constitutional tradition to open-ended doctrines of "national interest" or "inherent powers" which serve to erode and

<sup>&</sup>lt;sup>9</sup>The compiler of Howell's State Trials includes at the conclusion of the report of the landmark case of *Wilkes v. Wood* a comment by "the learned and constitutional author of the 'Canadian Freeholders' (Dialogue 2d, p. 242) which is enlightening in respect to the rejection of the doctrines of state necessity as a justification for executive warrants without prior judicial approval. The commentator wrote in respect to secretaries of state:

Persons of this description, when they are placed in stations of authority, are much more likely to advise their sovereign to do acts of an irregular, or doubtful nature, without inquiring how far the law allows of them, than a learned and graw lord chancellor, if it were but through mere ignorance, and though their intentions were very pure: but it often happens that to this ignorance of the law they add a contempt for it, and a disposition to disregard its restraints, and overleap the

then nullify guarantees of individual liberty, the Government in this appeal has attempted to assuage these fears by suggesting "limitations" which operate upon the awesome powers it claims for the Executive. These "limitations" when examined closely are illusory.

First among these supposed protections is the suggestion that the "standard of national security that the Attorney General applies is the same standard Congress provided in the Omnibus Crime Control and Safe Street Acts of 1968." We discuss later in the Brief (Point II, infra) the impact of 18 U.S.C. 2511 (3) upon the statutory scheme requiring judicial authorization for electronic surveillance. Whatever the meaning of this provision, 10 it is perfectly clear that the Attorney General in this case, contrary to the bland assertions in the Government Brief, meets neither the standards of "national security" set forth in this section nor any standards of preciseness and particularity required by the First and Fourth Amendments to the Constitution.

The Affidavit of the Attorney General invokes a vague and general power to "gather intelligence information"

limits it prescribes to their authority, which they are apt to consider as narrow pedantic rules which it is below their dignity to submit to and, like Achilles in the character given of him by Horace, 'Jura negant sibi nata, nihil non arrogant armis.' They are therefore fond of the doctrines of 'reason of state, and state necessity, and the impossibility of providing for great emergencies and extraordinary cases, without a discretionary power in the crown to proceed sometimes by uncommon methods not agreeable to the known forms of law,' and the like dangerous and detestable positions, which have ever been the pretence and foundation for arbitrary power. Wilkes, Id, at 1168-69.

10 The Court below held that the language in Section 2511 (3) "is not the language used for a grant of power" and was "clearly designed to place Congress in a completely neutral position" in respect to the claim of executive power made in this case. Judge Ferguson in the District Court in *United States v. Smith*, on the other hand, read 2511 (3) together with the rest of the statutory scheme, as a positive statutory prohibition against the claim of executive power made here.

through wiretapping when "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." Affidavit of Attorney General, App. 20-21. Such a standard to guide executive action in a field which by admission intrudes into the most vite and delicate of personal liberties, Olmstead v. United States, supra (opinion of Justice Brandeis), fails to meet the most elementary standards of either the First or Fourth Amendments as to precision and particularity. The extraordinary overbreadth and vagueness of these terms, "attempts" to "attack and subvert the existing structure of the government," operate as a sweeping dragnet which has the dangerous potential of inhibiting "the exercise of individual freedoms affirmatively protected by the Constitution," Baggett v. Bullitt. 377 U.S. 372 (1964) (opinion of Mr. Justice White). By its very terms, it is inevitable that the use of such a standard will "broadly stifle fundamental personal liberties," Shelton v. Tucker, 364 U.S. 479 (1960) (opinion of Mr. Justice Stewart). Such a standard "lends itself to selective enforcement against unpopular causes." NAACP v. Button, 371 U.S. 415 (1963) (opinion . of Mr. Justice Brennan), and "may easily become a weapon of oppression," NAACP v. Button at 436. Far from being a "limitation" upon the claims of power asserted by the Executive, the standards used here by the Attorney General permit the broadest incursions into protected political activities under the First Amendment. As the Court taught in Baggett v. Bullitt, the activity swept into the arena of permissible surveillance by these standards "goes beyond overthrow or alteration by force or violence." 377. U.S. at 370. As Mr. Justice White asked for the Court in Baggett, would the term "subvert the existing structure of the government" include "any organization or any person supporting, advocating or teaching peaceful but far-reaching constitutional amendments?" 377 U.S. at 370. Would such organizations or persons be "engaged in subversive activities," 377 U.S. at 370, which "subvert the existing structure of the government," Affidavit of Attorney General, App. p. 20, and thus

be subject to warrantless wiretapping at the sole discretion of the Attorney General?" And as Justice White asked for the Court in Baggett would "support [of] the repeal of the Twenty-Second Amendment or participation by this country in a world government," 377 U.S. at 370, subject a citizen to the sweep of the Attorney General's standards and thus to warrantless wiretapping? The standards used by the Attorney General in this case are far vaguer and broader than those condemned by this Court in Baggett, in Button, in Elfbrandt v. Russell, 384 U.S. 11 (1966), in Keyishian v. Board of Regents, 385 U.S. 258 (1967). As Justice White wrote in Baggett "the questions put by the Court in Cramp may with equal force be asked here," 377 U.S. at 368. Does the sweep of warrantless wiretapping "reach a lawyer who represents the Communist Party or its members or a iournalist who defends constitutional rights of the Communist Party or its members or anyone who supports any cause which is likewise supported by Communists or the Communist Party?" Baggett v. Bullitt at 638. These possibilities are unhappily not purely "fanciful," 377. As Justice White asked in Baggett,

Where does fanciful possibility end and intended coverage begin?

It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted for knowing but guiltness behavior nevertheless remains. 'It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches us that prosecutors too are human.' Cramp, supra, at 286-87. 377 U.S. 372.

From the stormy days of the 18th century in the colonies and the mother-country until the present period, history confirms the conclusions of this Court in Baggett that

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prosecutors, even the chief law officers of nations, are "human too" and that the liberties of the people cannot be entrusted to vaguely drawn overbroad grants of power particularly where the exercise of this power is hidden and cloaked and virtually unreviewable. The awesome implications of the overly broad grant of power to engage in internal domestic electronic surveillance which the present Administration seeks are frightening in their potential when considered against the background of the decided cases of this Court. As this Court wrote in Berger v. New York, "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices," 388 U.S. 41, 63.

Are the Washington, State teachers protected by this Court in Baggett from the overbreadth and 'sweep of the statutory terms there struck down, now to be subject to the warrantless wiretapping authorized by standards infected with the identical vice of overbreadth and vagueness condemned in Baggett? Are the civil rights organizers and lawyers of Louisiana protected from prosecution in Dombrowski under similarly worded standards rejected as overbroad and vague now to be subject to warrantless executive wiretapping? And the leaders of black organizations in Alabama protected in NAACP v. Alabama? Or the New York teachers protected from similar overbroad standards in Keyishian? The list can go on and on. Is this "fanciful possibility" or "intended coverage," Baggett v. Bullitt at 377? This Court has already given the answer the Constitution demands time and again. "It would be blinking reality," 377 U.S. at 377, not to recognize that "there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose." 377 U.S. at 360. The freedoms of the people may not be remitted to "well" intentioned prosecutors," 377 U.S. at 360, even Attorneys General. Cf. Entick v. Carrington, supra. As Justice Brennan wrote for the Court in Kevishian the standard here used is "plainly susceptible of sweeping and improper application." 385 U.S. at 599. And as the Court warned in Keyishian the vaguentss and sweep of the terms used here, "attempts" to "attack and subvert the existing structure of the Government," (Affidavit of Attorney General), create "uncertainty as to the scope [which] makes it a highly efficient in terrorem mechanism." 385 U.S. at 601.

This Court is now asked to sustain a claim of power to set aside the Fourth Amendment and authorize wholesale espionage through electronic surveillance, a euphemistic term for that "dirty business" Justice Holmes warned of years ago in Olmstead, against American citizens who may be engaged in activities which one man, the Attorney General, may believe "subvert the existing structure of the Government." These are not our words, or paraphrases. These are the words of the Attorney General himself. They are words this Court in Baggett, in Dombrowski, in Keyishian, in Cramp, has consistently struck down as overly broad and vague in setting standards for governmental action which touches fundamental liberties. The power which the Govemment here claims, unprecedented in our history, would sanction an arbitrary use of executive power to conduct espionage and surveillance over Americans exercising their basic right to oppose, dissent from, and organize politically against the policies of the existing government. In the words of Justice Stewart in Shuttlesworth such a claim of power "bears the hallmark of a police state," 382 U.S. at 91. The "security of the Republic" demands its forthright rejection by this Court. Stromberg v. California, 283 U.S. 359 (1951).

5. Again, perhaps conscious of the frightening implications of such a claim of power, the Government suggests that a safeguard of sorts exists in the "limited judicial review," Government's Brief at 21, to which the surveillance is subject. This suggestion is disingenuous if not consciously misleading. The government first asserts that "once the surveillance has been made, the courts may review it to determine its conformity with the standard of the Fourth Amendment, just as they review any other search and seizure that is challenged in the criminal proceeding by a mo-

tion to suppress or on objection to the evidence." Id. The government then proceeds to outline a proposed standard of review which turns the courts into a docile rubberstamp for any action whatsoever which the Attorney General may take. The "review" which is contemplated is candidly characterized as "extremely limited." Id. A more precise formulation would be "non-existent." "Review" is limited to whether the Attorney General's determination is "arbitrary and capricious." Id. The courts are to be excluded wholly from considering whether the "particular organization, per-, son, or event involved has a sufficient nexus to protection of the national security to justify the surveillance." Id. This is because the "facts and considerations" upon which this depends, "necessarily must be kept confidential." Id. At this point the true character of the "review" deemed permissible emerges. With a burst of candor the government admits that its real position is that "the nature of the gathering of domestic intelligence information makes inappropriate any extempt by the courts to review the need or wisdom for a particular surveillance." Id. at 22-23. In short no review by the courts of any "particular" surveillance is to be allowed. This is an assertion of unreviewable arbitrary power unparalleled in the history of the country. We may pardonably ask the government what issues it considers "appropriate" for judicial review if the "need or wisdom for a particular surveillance" is to be foreclosed to the courts? We surmise the answer will be the response given to the Parliament by the agents of George III that the only question open to review on the issuance of the general warrants was whether it was sealed by the King's seal. See Entick v. Carrington, supra. Here, as in 18th century England, the claim of executive power is a claim of arbitrary power uncontrolled by any meaningful judicial review. Only the word of the Attorney General stands between the citizen and his or her liberties. And this word we are asked to accept as unreviewable, as above the law, as long as it is his word.<sup>11</sup>

6. The Government rests its demand for power on its contention that adherence to the requirements of the Fourth Amendment would "frustrate" the purpose of the "investigative" surveillance program. This "frustration" it is claimed, would result from the "need for secrecy" and the "potential dangers to lives of informants." To put it bluntly the Government argues in essence that the mandates of the Constitution must be set aside in cases involving as here "attempts to subvert the existing system of government," because in such cases the judiciary cannot be trusted with the information upon which the executive seeks to act. This is an argument ill-becoming a government of limited powers and separate functions. Marbury v. Madison, supra. The reasoned response of the Court of Appeals for the Sixth Circuit completely repudiates the Government's rationalization.

Of course, it should be noted that the Fourth Amendment's judicial review requirements do not prohibit the President from defending the existence of the state. Nor does the Fourth Amendment require that law enforcement officials be deprived of electronic surveillance. What the Fourth Amendment does is to establish the method they must follow.

<sup>11</sup> The position of the Government is particularly ironic in this case since the Government in this Court impeaches the veracity of the Attorney General himself in the very affidavit which is the heart of their case and the foundation of their assertion of power. In this affidavit the Attorney General without qualification, characterizes the surveillance involved as being that of a "domestic" organization. In Footnote 13 to its brief the government says that "any characterization of the organization in question as 'domestic' is unsupportable." If the government itself finds "unsupportable" the characterizations of the Attorney General how can the liberties of a free people be entrusted to his unreviewable power?

If, as the government asserts, following that method poses security problems (because an indiscrete or corruptible judge or court employee might betray the proposed investigation), then surely the answer is to take steps to refine the method and eliminate the problems. No one could be in better position to help the courts accomplish this goal than the Attorney General. App. 61-62.

If there be a need for increased security in the presentation of certain applications for search warrants in the federal court, these are administrative problems amenable to solution through the Chief. Justice of the United States and the United States Judicial Conference and its affiliated judicial organizations. The inclination of the judiciary to meet the practical problems of enforcement in this area is evidenced in the specific holding of this Court and the United States Supreme Court in United States v. Osborn, 350 F.2d 497 (6th Cir. 1965), aff'd, 385 U.S. 323 (1966), and in the dictum in Katz v. United. States, 389 U.S. 347 (1967), upon which the search warrant terms of the Omnibus Crime Control & Safe Streets Act § 2516 were largely based. Congress clearly conceived situations so delicate that, for example, the Attorney General might seek his warrant for a search from the Chief Judge of the appropriate United States Court of Appeals. 18 U.S.C. § 2510 (Supp. V. 1965-69). So do we. But what we cannot coffeeive is that in the midst of the turmoil of the present day, the courts of the United States should suspend an important principle of the Constitution. The very nature of our government requires us to defend our nation with the tools which a free society has created and proclaimed and which, indeed, are justification for its existence. App. 62-63.

As the Court of Appeals so eloquently has pointed out, no argument based upon a need for "security" justifies the evasion of the Fourth Amendment attempted here. The truth of the matter is that "security" is not the real motivation behind the claim of power asserted. The Govern-

ment reveals what is really at stake when it admits that in the surveillances sought to be sustained "the justification for the surveillance ordinarily cannot be simply stated or easily demonstrated." Government's Brief at 25. History teaches us that this is the position which advocates of unrestrained executive power always take. The "jsutification" for these searches and seizures cannot be "simply stated" or "easily demonstrated" precisely because "[t]his gathering of information is not undertaken for the prosecution of criminal acts." Government's Brief at 16. If it was they could clearly meet the necessary showing of "probable cause" required by the Amendment. Katz v. United States, supra, and could comply with the conditions of the 1968 statute which permits surveillance upon the issuance of a warrant. See Point II, infra.

The extraordinary truth is that the Executive is not seeking the broad unlimited powers it asks for here to meet alleged problems of criminal conduct "dangerous" to the security of the nation, in which it could meet the classic requirements of probable cause and particularity which the "neutral and detached magistrate required by the Constitution," Coolidge v. New Hampshire, supra, can, pass upon. The powers the Executive here seeks are quite to the contrary to be used for the gathering of political information useful perhaps in crushing a domestic political opposition, but hardly needed to safeguard against criminal conduct of a serious nature. It is true that the "justification" for such wiretapping of domestic political opponents cannot be "simply stated" or "easily demonstrated," Government's Brief at 25, but this is because under the Constitution it would be difficult indeed to "easily" demonstrate the need for espionage and surveillance of political activities of citizens unrelated to and removed from the threat of immediate criminal conduct. And it would be even more difficult to "demonstrate" the need for a general search into the thoughts, the words, the innermost beliefs of citizens merely because one official believed that the citizen was attempting to "subvert the existing system of government." It was precisely this type of search which

the Amendment was designed to prohibit forever. As this Court wrote in *Marcus v. Search Warrant*, 367 U.S. 717 (1961):

This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power. *Id.* at 729.

In short, the Government is here arguing for a power, unrelated to the gathering of facts needed for a criminal investigation, a situation "traditionally appropriate for a determination of probable cause," cf. Government's Brief at 23, but required, so it says, for the gathering of "intelligence" related to domestic "attempts to subvert the existing government." Affidavit of Attorney General. This, in the language of our constitutional history, is an overt attempt to institute in this country "the espionage which forms the heart of the administrative system of continental despots." May, Constitutional History of England, supra. Such a system, the bulwark of the "tyranny and oppression" warned against by Justice Brandeis in Olmstead, violates the history, the spirit and the letter of the Fourth Amendment. It of fends against "the very essence of constitutional liberty and security." Boyd v. United States, 116 U.S. 616. The use of wiretapping as a basis for collecting political information from citizens active in domestic movements of political opposition, for the benefit of the administration in power, is, as the history of the twentieth century teaches, the "hallmark of a police state." Shuttlesworth v. Birmingham, supra. The government complains that meeting the requirements of the Fourth Amendment and in particular the "point" of the Amendment, the mandate of prior judicial approval by a "neutral and detached magistrate," Coolidge v. New Hamp shire, supra, "frustrates" the purposes of such surveillances. We agree. This is what the Fourth Amendment is all about; a prohibition written into our fundamental law against unlimited, uncontrolled executive power to search out at will

the innermost thoughts, ideas, and words of citizens who are political opponents of those momentarily in power. Boyd v. United States; Marcus v. Search Warrant; Katz v. United States; Coolidge v. New Hampshire, all supra

7. The final resort of the Government in its efforts to sustain this awesome claim of power for the Executive is the argument that throughout history, to paraphrase Dr. Johnson's famous comment, has been the last refuge of those who would build instruments of arbitrary executive power at the expense of the rights of the people. This is the raising of the spectre and fear of a "foreign" menace to justify the oppression of a political opposition at home. This was the ultimate argument of the ministers of George III to justify the demand for unlimited executive power to make general searches, see Entick, Wilkes, Leach, all supra. This was the argument raised to justify the now universally condemned Alien and Sedition Acts of 1798, see N. Y. Times v. Sullivan, 376 U.S. 254, 273 (1964); this was the argument the slaveholding states used to justify suppressing abolitionist "propaganda" as the work of "foreign" agitators;12 this was the argument used to justify the infamous Palmer Raids of 1920 which called forth the scathing denunciation of Mr. Justice Frankfurter prior to his appointment to this Court;13 this was at the heart of the excesses of the years of the Cold War.14

And once again, in an effort to justify arbitrary executive power over the fundamental liberties of the people, representatives of an administration in power raise before this Court the false issue that the sweeping bid for control they seek is required because of some "foreign" threat to our security. We discuss at a later point the utter ground-

<sup>&</sup>lt;sup>12</sup>See, George McDuffie, Message to Legislature of South Carolina, 1835, reproduced in Scott, Living Documents in American History, Vol. 1, p. 323.

<sup>13</sup> See generally Peterson and Fite Opponents of War, 1917, 1918.

<sup>14</sup> See generally Arthur Link, American Epoch, Ch. 27.

lessness of any reliance upon a so-called "foreign security" exception to the combands of the Fourth Amendment as a justification for the surveillances involved in this case. See Point I-B infra. What must be stressed at this point is that this calculated attempt at the last stages of this case to introduce into the record considerations of supposed "foreign security problems," Government's Brief at 30, 31, merely underscores the danger to constitutional freedoms which flows from a cavalier insertion of a "foreign" component whenever the government seeks to justify the evasion of constitutional commands. This case simply does not involve "foreign security problems." We do not have to speculate on this. The Attorney General himself in the only sworn statement before the District Court, the Court of Appeals, and this Court, has said that the surveillances concerning the respondents in this case were of a "domestic" organization involved, according to the Attorney General, in "attempts to subvert the existing structure of the government." App. at 20. There is not a word in the affidavit about any "foreign security problems" whatsoever. Not until the brief filed in this Court have there been any suggestions that such considerations were present in respect to the surveillances here involved. We do not believe it necessary to argue at any length in this Court that the most elementary principles of fairness restrict the Attorney General to the statements made in his own affidavit which are the only facts in the record before the Court as to the nature of the surveillances. Cf. Cole v. Arkansas, 333 U.S. 196 (1948). The Solicitor can hardly be heard to impeach the Attorney General's own affidavit on the one hand, and then blandly ask the Court on the other hand to sustain as a matter of executive power the Attorney General's right to decide when the Fourth Amendment is to be violated. Cf. Entick v. Carrington, supra. But the real lesson in the Government's attempt to equate by legal sleight-of hand "domestic" warrantless wiretapping with "foreign security problems," is the ease with which such maneuvering could wipe out Fourth Amendment fundamental protections for all the

people merely by an assertion that in effect all domestic political opposition today is intermingled with "foreign security considerations." As in the first days of the Republic when the cry of "French agent" greeted every Jeffersonian anti-Federalist,15 the claim of "foreign" connections can be raised to tar every aspect of domestic political opposition in contemporary America. This is not idle speculation as most impartial observers of the 1950's in this country have commented. If the Attorney General can conduct warrantless general searches into the ideas, conversations, and opinions of any American on his own vague, unilateral determination that their political activities in some way involve "foreign security considerations," with nothing more to sustain this than the affidavit in this case, then in truth the word "national security" has become "a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, supra. This Court taught in United States v. Robel, 389 U.S. 258 (1967), that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." 389 U.S. at 263. And in Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 389 (1934), the Court reminded the nation that "[E]ven the war power does not remove constitutional limitations safe-guarding essential liberties." 290 U.S. at 426. The warning words of this Court in Robel teach us the implications of the government's last minute attempt in this case to obscure the fundamental issues involved by raising a baseless contention of "foreign security considerations."

deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals

<sup>&</sup>lt;sup>15</sup>D. Stewart, The Opposition Press of the Federalist Period, chap. 8 (1969).

enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic, if in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile. Robel, supra at 263-64.

The Government closes its plea for the extraordinary powers sought by assuring the Court that "if the Attorney General should ever abuse his authority . . . the courts could correct the situation." Government's Brief at 35. We suggest to the Court that this is a moment ominous in its implications for the future of this nation, a moment which calls for this Court once again, to "correct the situation" by reaffirming the fundamental mandates of the Constitution. The issues raised here touch, as this Court has taught, our "most fundamental constitutional concepts." Coolidge v. New Hampshire. The sweeping and awesome power which the representatives of the present Executive seeks would sanction the reappearance in our society of what James Otis declared in Boston in the year 1761 was "the worst instrument of arbitrary power." Boyd v. United States, supra at 625. If the position of the government is sustained here general warrantless searches and seizures will have been sanctioned by this Court as an instrument of executive power, and the most fundamental principles of our system of government, in the words of this Court, "the very essence of constitutional liberty and security," U.S. at 630, will have been abandoned in the name of arbitrary executive power. The "security of the Republic," Stromberg v. California, demands that this Court exercise its awesome responsibility to restrain the Executive Branch from crossing those boundaries placed upon its powers by the sovereign people in the fundamental compact. Marbury v. Madison, Youngstown Sheet and Tube Co. v. Sawyer, Powell v. McCormack, As Mr. Justice Harlan wrote in one of his last opinions for this Court, this duty to "say what the law is" Marbury v. Madison, "inheres in the structure of the constitutional system itself." Oregon v. Mitchell, 400 U.S. 112, 205 (1971). The liberties of the people, the safety of the Republic itself, demand that the claims of the Executive for sweeping, unlimited and arbitrary power to conduct warrantless wiretapping of American citizens be firmly rejected. As the Court said in Reynolds v. Sims, 377 U.S. 533 (1964), the "oath" and the "office" of the judiciary "demand no less."

- B. The Claim of Power of the Executive Would Sanction Sweeping General Searches Without Prior Judicial Authorization, a Showing of Probable Cause or a Requirement of Particularity in Total Violation of the Fourth Amendment.
- 1. The power claimed by the executive would resurrect the arbitrary searches authorized by the infamous general writs and writs of assistance which kindled the struggles of the 18th century out of which the independence of the nation was born.

The enormity of the claim of power which the Executive makes here becomes clear when it is considered against the backdrop of our experience as a people. For the first time before this Court the representatives of an administration in power have asked boldly for an imprimatur of legality to be placed upon a program of uncontrolled wiretapping and surveillance of thousands of Americans whose political activities in the sole judgment of one man may tend to "subvert the existing system of government." This proposed system of domestic espionage which would sweep into its net countless numbers of citizens whose thoughts, ideas, opinions and associations may clash with those in high places, cf. Baggett v. Bullitt, 377 U.S. 360 (1964), NAACP v. Button, 371 U.S. 415 (1963), Keyishian v. New York, 385 U.S. 258 (1967), not only transgresses against the "point" of the Fourth Amendment, Coolidge v. New Hampshire, 403 U.S. 443 (1971), the "governing principle, justified by history and by current experience," Camara v. Muni-

cipal Court, 387 U.S. 523, 528 (opinion of Mr. Justice White), that a search violates the Amendment as "unreasonable" "unless it has been authorized by a valid search warrant," 387 U.S. at 529. See Point I A, supra at 19. Even more frighteningly, the program which the Executive has here for the first time publicly admitted to the country it has been undertaking, and now seeks sanction for, would reinstate in full force the broad general searches authorized by the infamous general warrants and writs of assistance which flourished in the "abuse of executive authority." Cooley's Constitutional Limitations, supra at 612, which characterized the rule of George III. The extraordinary nature of the Executive's demand for power can only be really grasped when the nature of the program the Attorney General has undertaken is examined against the backdrop of the 18th century struggles out of which "the Child Independence was born." Boyd v. United States, 116 U.S. 616 (1885).

The Attorney General is now authorizing electronic surveillance of domestic organizations and citizens without a showing of probable cause that the surveillance will uncover evidence of crime. Thus he states to this Court:

This gathering of information is not undertaken for the prosecution of criminal acts, but rather to obtain the intelligence data deemed necessary to protect the national security. Government's Brief at 16

The Attorney General's sole judgment or suspicion that an individual or group is somehow "subversive" justifies electronic surveillance of all the subject's conversations and activities, normatter if they are entirely lawful. Indeed, the Government states:

The traditional standard of probable cause would be wholly inappropriate for testing the reasonableness under the Fourth Amendment of this category of search and seizure. Government's Brief at 23

Since the surveillance is not directed at any specific criminal activity, there is of course no "particularity" as to the people to be searched or the conversations to be seized.

The "roving ear" of federal agents is omnipresent since apparently all the Attorney General requires is mere suspicion that the subject of surveillance is of a "subversive" nature, whatever that may mean. See Point I A, supra

The Government then boldly asked this Court to ignore the constitutional mandate that searches may only lawfully occur upon a showing of probable cause and the issuance of a prior judicial warrant which describes with particularity the things to be seized. Boyd v. United States, supra, Marcus v. Search Warrant, 367 U.S. 717 (1961); Stanford v. Texas, 379 U.S. 476 (1965); Katz v. United States, 389 U.S. 347 (1967); Coolidge v. New Hampshire, supra. This request for an "exception" to the Amendment's commands is in reality a request for an outright repeal of the Amendment's fundamental requirement of probable cause and particularity.

Even when exceptions to the warrant requirement of the Amendment have been granted in a few specified and narrowly restricted situations, see Coolidge v. New Hampshire, supra, such exceptions are never sustained where probable cause for the search does not otherwise exist and the requirement of particularity is not also preserved. In all

<sup>16</sup> For example, Chimel v. California, 395 U.S. 756 (1967), allows for a limited search incident to a lawful arrest strictly confined to the suspect's person and the area within his immediate reach. Cf. Terry v. Ohio, 392 U.S. 1 (1968), authorizing a limited patdown for weapons when a police officer has reason to believe he is in physical danger from an armed individual. In Warden v. Hayden, 387 U.S. 294 (1967), the Court permitted a search by police officers in hot pursuit where they had reason to fear for their own safety and the safety of others, making the delay occasioned by the obtaining of a prior warrant highly dangerous.

Searches of automobiles have posed a particularly difficult problem for the court and in a series of cases, warrantless searches that have otherwise adhered to Fourth Amendment standards have been allowed. See generally Carroll v. United States, 267 U.S. 132 (1925); compare Preston v. United States, 376 U.S. 364 (1964); see also Cooper v. California, 380 U.S. 58 (1967); Harris v. United States, 390 U.S. 234 (1968).

cases a clear judicial "purpose to guard against all general searches" has been consistently preserved. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1930). Here, the Executive brushes aside as non-existent the requirements of probable cause and particularity. The Government attempts to justify the flagrant disregard of the requirements of the Fourth Amendment by arguing that electronic surveillance is a search conducted by stealth rather than force, and therefore, a "lesser" invasion of privacy:

The overhearing of a telephone conversation—and particularly where, as here, the speaker's own telephone has not been tapped but the overhearing results from his telephone call to a number that is under surveillance (see h, , infra)—involves a lesser invasion of privacy than a physical search of a man's home or his person. While such surveillance is subject to the Fourth Amendment (Katz v. United States, supra), the determination of its reasonableness properly should take cognizance of the extent of the invasion of privacy involved. Government's Brief at 13.

This Court has always rejected the view that the degree of physical force employed in the execution of a search is in any way relevant to the lawfulness of the search. The essence of the Fourth Amendment is the protection of personal security and privacy against invasion by any means. As this Court said so forcefully in Boyd v. United States,

It is not the breaking of his doors, and the rummaging of his papers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. 116 U.S. at 630 (emphasis added)

This Court has recognized that "[f]ew threats to liberty exist which are greater than that posed by the use of eaves-

dropping devices." Berger v. New York, 388 U.S. 41, 63 (1967). Unlawful seizures of conversations by mechanical means are fully as serious under the Fourth Amendment as any unlawful intrusion by government into a citizen's security. Mr. Justice White applied this principle, writing for the Court in Alderman v. United States, 394 U.S. 165, 179 (1969):

We adhere to the established view in this Court that the right to be secure in one's house against unauthorized intrusion is not limited to protection against a policeman viewing or seizing tangible property—"papers" and "effects." Otherwise, the express security for the home provided by the Fourth Amendment would approach redundancy. The rights of the owner of the premises are as clearly invaded when the police enter and install a listening device in his house as they are when the entry is made to undertake a warrantless search for tangible property; 394 U.S. at 179-80

In Alderman, the Court also rejected the view that the seizure of a third person's conversation by an unlawful wiretap was thereby made less serious.

the prosecution as surely employs the fruits of an illegal search of the home when it offers overheard third-party conversations as it does when it introduces tangible evidence belonging not to the homeowner but to others. *Id.* at 180

The Government's argument exposes the dragnet nature of electronic surveillance, and its harsh intrusion upon the privacy of even those under no suspicion of any criminal conduct. It is necessary to be blunt and direct. The investigative surveillance program the Attorney General has admitted he has initiated and for which he now seeks the approval of this Court, is a program of sweeping general searches without probable cause or particularity. These are the searches once authorized by the hated general warrants and writs of assistance upon whose destruction this country built its freedom and independence. The proud history of

the struggle against these instruments of "oppression and tyranny," Olmstead v. United States (opinion of Justice Brandeis), has been often retold in this Court. Boyd v. United States; Marcus v. Search Warrant, Stanford v. Texas, all supra: The enormity of the Executive's claim of power made in this case requires that it be considered against a brief restatement of the history which was fresh "in the minds of those who framed the Fourth Amendment to the Constitution," Boyd v. United States, supra at 627.

The Fourth Amendment embodies the fruits of a long struggle both in England and the colonies against the abuses of unrestrained and unsupervised search power. From their own experiences in the colonies and familiarity with recent eyents in England, the proponents of an addition of a Bill of Rights to the Constitution had a clear understanding of the vices of general warrants and writs of assistance, Boyd v. United States, supra. The requirements of probable cause for issuance of a warrant and particularity of description of the objects or persons to be seized were thus designed to prevent an abusive use of the search power without depriving government of the means to obtain evidence of crime.

A broad search and seizure power had first been utilized in England by the Tudors, and was used both for suppression of seditious writing and control of the smuggling trade.<sup>17</sup>

Abuses of the search power were gradually checked by Parliament and concurrently by the development of the common law. In 1685 the House of Commons impeached

<sup>17</sup> James I commanded the Court of High Commission "to inquire and search for . . . all heretical, schismatical and seditious books, pamphlets and portraitures offensive to the state or set forth without sufficient and lawful authority" and seize the materials and the presses used to print them. Landynski, Search and Seizure and the Supreme Court 22 (1966). During the reign of Charles I, in an attempt to collect trade duties, the Privy Council authorized messengers "to enter into any vessel, house, warehouse, or cellar, search in any trunk or chest and break any bulk whatsoever." Lasson, The History and Development of the Fourth Amendment 30 (1937)

the chief justice, with one of the counts against him being his issuance of "general warrants for attacking the person and seizing the goods of his majesty's subjects, not named or described particularly, in the said warrants; by means whereof many ... have been vexed, their houses entered into, and they themselves grievously oppressed, contrary to law." See Lasson, supra at 38. More important than the actions of Parliament was the development of the common law. Most prominent of the common law jurists was Chief Justice Hale, who in his History of the Pleas of the Crown set down standards that would later become constitutional principles here in the United States. Hale said that search warrants were proper on the grounds of "necessity, especially in these times, where felonies and robberies are so frequent," but stated that a warrant must meet certain standards to be valid. Hale declared that a complainant seeking a warrant should be required to demonstrate probable cause before its issuance.

They [warrants] are not to be granted without oath made before the justice of a felony committed, and that the party complaining hath probable cause to suspect they are in such a house or place, and do show his reasons of such suspicion. Hale, II History of the Pleas of the Crown, 149-50 (1st Am. ed. 1847)

The Secretary of State nevertheless continued to employ prosecutions for seditious libel as a means of regulating the press and issued general warrants to aid in the seizure of seditious literature. However, powerful opposition to this practice did not arise until 1762 with the famous case of John Wilkes and John Entick.

Wilkes, then a member of Parliament, published anonymously a series of pamphlets called the North Briton, which were highly critical of the government. In 1763, No. 45 of the series appeared, containing a bitter attack upon the King's Speech calling for obedience to enforcement of the

cider tax. 18 Lord Halifax, the Secretary of State, issued a warrant to four messengers ordering them:

to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, the North Briton, No. 45, ... and them, or any of them, having found, to apprehend and seize, together with their papers. Leach v. Three of the King's Messengers, 19 How. St. Tr. 1001, 1004 (1765)

This warrant was general as to the persons to be arrested, the places to be searched, and the items to be seized. Since the messengers were given absolute discretion as to whom they should arrest and where they should search, they were not bound by any requirement of probable cause. The result was the arrest of 49 persons in three days. Finally they learned that Wilkes was the author of the pamphlet and arrested him and ransacked his house.

All the printers brought suit for false imprisonment.

Chief Justice Pratt held the warrant illegal and sustained damages, 19 saying:

18 The North Briton, No. 45, retorted:

Is the spirit of concord to go hand in hand with PEACE and EXCISE, through this nation? Is it to be expected between an insolent EXCISEMAN, and a peer, gentlemen, free holder or farmer whose private house are now made liable to be entered and searched at pleasure? XV Parliamentary History, 1334 (1813)

It is ironic that the Wilkes case arose out of an attempt to use a general warrant to suppress a publication complaining of general warrants.

19 Chief Justice Pratt sustained exemplary damages because of the threat to English liberty posed by the general warrant.

But the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light which the great point of the law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the king's subjects, exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the kingdom, by insisting on the legality of this general warrant before them; they heard the

To enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour. Huckle v. Money, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763)

Wilkes himself brought suit, and the Chief Justice again sustained a verdict against the defendants. He declared the warrant invalid, emphasizing the lack of probable cause and particularity.<sup>20</sup>

The defendants claimed a right under precedents to force persons' houses, break open escritoires, seize their papers, upon a general warrant, where no inventory is made of the things taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicion may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject. If higher jurisdictions should declare my opinion erroneous, I submit as will become me, and kiss the rod; but I must say I shall always consider it a rod of iron for the chastisement of the people of Great Britain. Wilkes v. Wood, 98 Eng. Rep. 489, 19 How. St. Tr. 1153, 1167 (1763)

King's Counsel, and saw the solicitor of the Treasury endeavor to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas that struck the jury on the trial; and I think they have done right in giving exemplary damages. Huckle v. Money, 2 Wils. K.B. 206, 95 Eng. Rep. 768 (1763). Cf. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) (Burger, C.J. dissenting).

<sup>20</sup>These decisions were greeted with great acclaim in England, and Chief Justice Pratt became one of the most popular men in the country. The city of London had him sit for his portrait by the famous artist, Sir Joshua Reynolds. When completed, the portrait was hung in Guildhall with an inscription by Dr. Johnson designating him the "zealous supporter of English liberty by law." Foss, Judges of England, 536 (1870), cited by Lasson, supra at 46.

The success of Wilkes encouraged John Entick to bring suit over a similar incident which occurred about a half year prior to the Wilkes incident. Again, it was an attempt of the Government to silence the press. Lord Halifax had issued a warrant to search for Entick, author of the Monitor or British Freeholder and seize him together with his papers. Thus the warrant, while being specific as to the person, was general as to the places to be searched and the items to be seized. In 1765, Pratt, now Lord Camden, held the general warrant invalid, stating:

If this point should be decided in favor of the jurisdiction, ... the secret cabinets and bureaus of every subject in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel. *Entick v. Carrington*, 19 How. St. Tr. 1029, 1063 (1765).

The popular feelings aroused by these decisions were influential in forcing Parliament to act to abolish general search warrants. In the debates in the House of Commons, William Pitt made a classic declaration of the cherished right of privacy of English citizens.

The poerest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter, all his force dares not cross the threshold of the ruined tenament. Quoted in Cooley, I Constitutional Limitations 611 (8th ed. 1927)

In 1766 the House of Commons declared them illegal except when specifically authorized by Parliament. However, the power to issue writs of assistance to search for smuggled goods remained unimpaired.

Meanwhile, a similar struggle against general search warrants was occurring in the colonies, centering around the writs of assistance used by customs officers in the effort to stamp out smuggling. These writs were even more odious than the general warrants of the Wilkes case, which were at least directed at the perpetrators of a particular offense. The writs of assistance were permanent search warrants placed in the hands of customs officials valid for the duration of the life of the sovereign; they could be used with unlimited discretion and were not returnable upon execution.

The writs were most frequently employed in the colony of Massachusetts, and it was there that the greatest opposition arose to their enforcement. In 1760, George II died and the existing writs of assistance expired. In the same year, Sir Francis Bernard, a Crown officer, became Governor of Massachusetts, and he appointed Thomas Hutchinson as Chief Justice, as one who would support the Crown in any controversy. The hearing for the issuance of new writs became the focus of political opposition to the trade laws. The attorney for the Crown, Jeremiah Gridley, flatly asserted that:

Everybody knows that the subject has the privilege of house only against his fellow subjects, not against the King either in matter of crime or fine. Quincy, Massachusetts Reports, Gray's Appendix, 477 (1865)

The merchants engaged the noted lawyer James Otis to argue their cause. Otis characterized the writs as "the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book." He stated that the writs were a power that placed the "liberty of every man in the hands of every petty officer," since custom officers were permitted to enter houses when they pleased upon bare suspicions without oath. He denounced the writs as destructive of the fundamental right of privacy and security of the home.

This writ is against the fundamental principles of law, the privilege of house. A man who is quiet is as secure in his house as a prince in his castle, notwithstanding all his debts and civil procedures of any kind. Quincy, supra, at 471, from the notes of John Adams

This was a basic right whose security lay at the heart of the need for Independence. John Adams, in reference to Otis' remarks, stated "then and there the child Independence was born. In 15 years, namely in 1776 he grew to manhood, and declared himself free." Adams, Life and Works of John Adams, 247-48; see Boyd v. United States, supra. Chief Justice Hutchinson led the Massachusetts court in approving the issuance of the writs, but the forceful opposition that developed made their execution virtually impossible.<sup>21</sup>

This Court has taught that the opposition to the oppressive use of the search power was a major factor in the unification of the colonies against the English government. Stanford v. State of Texas, supra, at 481. When an angry Continental Congress on October 26, 1774, petitioned the King for redress of grievances, among those grievances listed was the abuse of the search power.

The officers of the customs are empowered to break open and enter houses, without the authority of any civil magistrate, founded on legal information. Quoted in Lasson, supra at 75.

Against this history and their own direct experience with the writs of assistance, the former colonies sought to provide safeguards against abusive searches in the constitutions they enacted after the Revolution for their new state governments. The states of Virginia, Maryland, North Carolina,

<sup>&</sup>lt;sup>21</sup>During the Stamp Act Riot of 1765, angry colonists burned Judge Hutchinson's house to the ground in retaliation for his lead in granting the writs of assistance. Governor Bernard described the incident in a letter to the Lords of Trade.

Last of all the . . . Chief Justice's house [was] destroyed with a savageness unknown in a civilized country. I mention him as Chief Justice, as it was in that character he suffered; for this connecting him with the Admiralty and Custom house was occasioned by his granting writs of assistance to the Custom house officers, upon the accession of his present Majesty; which was so strongly opposed by the Merchants that the Arguments in Court from the Bar lasted three days. The Chief Justice took the lead in the Judgment for granting Writs, and now he has paid for it. Quincy, supra, at 416, n.

Massachusetts, Pennsylvania, New Hampshire, and Vermont each wrote into its constitution a prohibition against general warrants.<sup>22</sup> The constitutions vary slightly in wording, but all sought to forbid abusive general searches by requiring that a search warrant could not be issued except upon probable cause given by oath and affirmation and must include a particular description of the person or things to be seized.

The wording of the Fourth Amendment reflects this history. The requirements that no warrant should issue "but upon probable cause, supported by oath or affirmation" and "particularly describing the place to be searched, and the persons or things to be seized" were thought sufficient and necessary to forever proscribe the use of general warrants by the new national government.

This Court has been steadfast in its commitment to enforcing these historic commands of the Amendment, the "true and ultimate expression of constitutional law," Boyd v. United States, 116 U.S. at 626. From Boyd to Coolidge in this last term, this Court has faithfully enforced those mandates of particularity and probable cause which history has written into the heart of the Fourth Amendment. Today, the Government asks this Court to ignore these mandates, to ignore our history, to authorize those instruments of "oppression and tyranny," Boyd v. United States, the general warrant and writ of assistance which the Fourth Amendment was written to forever proscribe.

The technology of electronic surveillance was, of course, unknown in the eighteenth century. Yet the present practices of the Justice Department, for which approval is sought in this Court, embody the very characteristics of the general warrant the Fourth Amendment was intended to abolish. Since the searches are not conducted to obtain evidence for the prosecution of criminal acts (Government's Brief at 16, 19), there necessarily can be no compliance

<sup>&</sup>lt;sup>22</sup>The provisions of the state constitutions are quoted *infra* at p. 81, n. 24.

with the requirement of probable cause. These investigative searches for the purpose of "gathering intelligence information for the President" (Government's Brief at 19) by definition do not comply with the requirement of particularity.<sup>23</sup> No return is made to a judge of the evidence obtained.

In the area of electronic surveillance this Court has been no less the jealous guardian of the Fourth Amendment.

Mr. Justice Clark, writing for this Court in Berger v. New York, 388 U.S. 41 (1967), declared invalid a New York statute authorizing wiretapping because its lack of proper standards permitted general searches pursuant to general warrants. Id. at 44. The Court held that electronic surveillance can only be constitutionally authorized upon a showing of probable cause that a particular crime is or has been committed.

The purpose of the probable-cause requirement of the Fourth Amendment [is] to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed. . . Id. at 59.

In the area of electronic surveillance this Court has recognized the special importance of strict adherence to the Fourth Amendment's requirement of particularity.

The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope. As was said in Osborn v. United States, 385 U.S. 323 (1966), the indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth

<sup>&</sup>lt;sup>23</sup>The nature of these searches is best illustrated by the description of a single "surveillance" in the Government's Brief at 30-31, n. 13. The surveillance continued over a fourteen-month period in which at least 952 phone calls, and most likely far more, were overheard and recorded.

Amendments, and imposes a heavier responsibility on this court in its supervision of the fairness of procedures... at 329, n. 7. Berger v. New York, supra at 55-56

The political espionage for which the Attorney General openly now seeks sanction is plainly and simply a system of warrantless searches and seizures without any showing of probable cause and without any showing of particularity. In the words of James Otis it is "against the fundamental principles of the law," and it truly, as William Pitt said on the floor of the Commons, "abandons the liberty" of all the people. To permit the reintroduction into American life of this system of spying on citizens would be, in the words of James Otis before the Massachusetts Court, tolerating "the worst instrument of arbitrary power."

2. The doctrine of "inherent powers" does not sustain the Executive's attempt to suspend in its own judgment the constitutional mandates of the Fourth Amendment protecting the liberties of the people.

As we have pointed out earlier, in order to justify this awesome reach for power to brush aside the commands of the Fourth Amendment, the government has once again summoned up the notion of some inchoate "inherent" power in the Executive which authorizes the suspension of constitutional requirements in his sole judgment that the "national interest" in some way requires this. Cf. Youngstown Sheet & Tube Co. v. Sawyer, supra.

As the Court below so sharply pointed out:

The government has not pointed to, and we do not find one written phrase in the Constitution, in the statutory law, or in the case law of the United States, which exempts the President, the Attorney General or federal law enforcement from the restruction of the Fourth Amendment in the case at hand.

Essentially, the government rests its case upon the inherent powers of the President as Chief of State to defend the existence of the State. We have already shown that this very claim was rejected by the Supreme Court in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (App. 59. (1952).

In order to sustain this position, the Government has reached far afield into the cases concerning the President's war-making and foreign relations powers searching for justification for the warrantless general searches of citizens involved in this appeal. The Court of Appeals disposed decisively of the Government's reoccurring litany of these cases:

Decision of six of the cases relied upon is based upon the war powers or foreign relations powers of the president-Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 109 (1948); United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-20 (1936); Cafeteria Workers v. Mc-Elroy, 367 U.S. 886, 890 (1961); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); United States v. Pink, 315 U.S. 203 (1942); Totten v. United States, 92 U.S. 105 (1875). None of these cases are criminal cases. None of these cases involve the Fourth Amendment. None of them involved wiretapping. These cases we deem totally inapplicable to the instant case where the Attorney General has certified that we deal with a domestic security problem. (App. at 45)

This claim of "inherent" power masks the real-issue, for the only acceptable test is as this Court has taught, whether "the President's power . . . stem(s) either from an act of Congress or from the Constitution itself." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1953). The Court below found Youngstown to be depositive of the inherent powers claim. The words of Mr. Justice Black for the Court are wholly governing here:

It is clear that if the President had authority to issue the order he did, it must be found in some

provision of the Constitution. And it is not claimed that express constitutional language grants this power to the President. The contention is that presidential power should be implied from the aggregate of his powers under the Constitution. Particular reliance is placed on provisions in Article II which say that "The executive Power shall be vested in a President"

... "; that "he shall take Care that the Laws be faithfully executed"; and that he "shall be Commander in Chief of the Army and Navy of the United States."

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities. Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for

freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand. 343 U.S. at 387-89 (Emphasis added)

The Executive attempts to justify its extravagant claims of power to override the commands of the Fourth Amendment by asserting as it has in the past the need of the nation to "preserve" itself. The Government argues:

The governmental objective here is of grave importance, and the Constitution should not be construed to "withdraw from the Government the power to guard its vital interests" in the area. United States v. Robel, 389 U.S. 258, 267; see also Aptheker v. Secretary of State, 378 U.S. 500, 509. Government's Brief at 26.

In the very cases the Executive relies upon for its justification, this Court rejected the "talismanic," cf. United States v. Robel, supra, use of "national security" or the "war power." In striking down a statute regulating employment in defense plants, this Court taught that "the phrase war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit." Id. The Court went on to say:

this concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to protect such a goal. Implicit in the term "national defense" is the notion of defending those values and ideas which set this nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideas have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of Association—which makes the defense of the Nation worthwhile. 389 U.S. at 264.

Aptheker v. Secretary of State, supra at 508, is in complete accord.

Alarms by the Executive Branch of threats to national security have been repeatedly sounded as different administrations have served their terms. The words of the Bill of Rights would have become hollow rhetoric long ago if this Court had acceded to the fears of the moment raised by past administrations to justify their demands for more power. At critical moments in our history, this Court has had to fulfill its unique constitutional responsibility to rise above political exigencies of the period in order to preserve the constitutional government of the nation. Marbury v. Madison, supra. Cries by the Executive of threats to "national security" by reason of a particular danger of "subversion" change with chameleon-like facility with each decade. Some such instances of hysteria or excess of zeal would best be forgotten if it were not for the need to place the Executive's fears of today in historical perspective.

In the aftermath of the crisis generated by the Civil War, the overreaching of executive authority came sharply before this Court in a landmark case, Ex parte Milligan, 4 Wall. 2 (1866). The Executive had sought to avoid the regular procedures of resort to the judicial branch in bringing to justice those who in his opinion threatened the national security. Even in regions remote from military operations and where the operation of federal courts continued despite the war, citizens were arrested by zealous military commanders for "disloyal practices affording aid and comfort to rebels" and in accordance with the President's proclamation of September 24, 1862, were tried and sentenced by military tribunals. One L. P. Milligan was tried before a military commission in Indiana and convicted of conspiracy to release and arm rebel prisoners and to march with these men into Kentucky and Missouri in order to cooperate with rebel forces there for an invasion of Indiana. In April 1866, this Court issued its historic decision in Ex parte Milligan, supra, unanimously holding that the military tribunal authorized by the President was unlawful. Mr. Justice Davis, speaking

for the Court in elequent words, proclaimed the inviolability of the Bill of Rights even when the nation was involved in a civil rebellion:

Time has proven the discernment of our ancestors; for even these provisions [of the Bill of Rights], expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of Constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority. 4 Wall, at 295 (Emphasis added).

This Court reaffirmed that the Constitution was the Supreme Law of the land, and that its provisions could not be suspended by the Executive upon his own determination of "necessity" to protect the national security, even in time of war.

> Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this

right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew-the history of the world told them-the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresignt could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning the writ of habeas corpus. Id. at 297.

The words of Mr. Justice Davis are powerfully appropriate here. The Executive today claims the power to set aside time honored mandates of the Constitution which protect individual liberty when in its own judgment the national necessity requires it. The answer to this claim is the answer of the Court in 1866: "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." 4 Wall. at 295.

This century once again witnessed a frightening example of the Executive's invocation of the national security as justification for destruction of individual liberty. In January, 1919, Attorney General A. Mitchell Palmer launched a gigantic "Red hunt," marked by mass arrests without challenge by habeas corpus, permitted hasty hearings and prosecutions entirely lacking in the rudiments of due process, and mass deportations of aliens suspected to be Communists. In habeas corpus proceedings arising out of the notorious "Palmer Raids" in which thousands of suspected aliens and

Communists were seized and detained under Executive order, Felix Frankfurter, then a professor at Harvard Law School, and Professor Zechariah Chafee appeared as amicus curiae arguing that the arrests, detentions, and deportation hearings were unlawful. After hearing extensive evidence, the Court found that the Justice Department had deliberately sought to magnify the supposed threat to the national security posed by these aliens in order to justify the procedures used in the public eye.

Pains were taken to give spectacular publicity to the raid, and to make it appear that there was great and imminent public danger, against which these activities of the Department of Justice were directed. The arrested aliens, in most instances perfectly quiet and harmless working people, many of them not long ago Russian peasants, were handcuffed in pairs, and then, for the purpose of transfer on trains and through the streets of Boston, chained together. ... On detraining at the North Station, the handcuffed and chained aliens were exposed to newspaper photographers and again thus exposed at the wharf where they took the boat for Deer Island. The Department of Justice agents in charge of the arrested aliens appear to have taken pains to have them thus exposed for public photographing: Colver v. Skeffington, 265 F.17, 44 (D. Mass. 1920) (Emphasis added).

The federal court ordered the release of virtually all the aliens ordered to be deported because the proceedings were "vitiated by lack of due process of law." Id. at 79. The "Palmer raids" are generally acknowledged to have been a sad chapter of our history. If the theories of the present Executive, the "incantation" of national security, cf. United States v. Robel, supra, is permitted once again to become a "talisman" in whose presence the Constitution "fades away and disappears," Coolidge v. New Hampshire, supra, then in truth the "security of the Republic," Stromberg v. California, 283 U.S. 359 (1951) will be imperiled.

Unhappily, in recent times this Court has had to reassert the supremacy of the Constitution and reject the shibboleth

of "national interest" as a magic wand, which can wave away the "inconveniences" of the Bill of Rights.

In Stanford v. Texas, supra, 'this Court invalidated a search by Texas law enforcement officers of the home of a leader of the Communist Party. The Texas statute and the actions of the State officers pursuant to that law can best be described as a wholesale incursion into the liberties of Mr. Stanford. The officers, in the name of "national security" seized everything within sight including the writings of Pope John XXIII and of the late Mr. Justice Black. Mr. Justice Stewart, speaking for a unanimous Court found the words of the Fourth Amendment to be as "precise and clear" as when they were written:

The Constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.

Two centuries have passed since the historic decision in Entick v. Carrington, almost to the very day. The world has greatly changed, and the voice of nonconformity now sometimes speaks a tongue which Lord Camden might find hard to understand. But the Fourth and Fourteenth Amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant—no less than the law 200 years ago shielded John Entick from the messengers of the King. 379 U.S. at 485-86.

As we have pointed out earlier, the Court has had the occasion in recent years to reassert that invocation of national security does not justify the abrogation of the right of political association, *United States v. Robel, supra* at 264, or the right to travel, *Aptheker v. Secretary of State, supra* at 508 (1963). At the end of the last term of this Court, this Administration again sought to limit vital constitutional rights of the people in the interest of "national security." In New York Times Company v. United States, 403 U.S. 713 (1971), the Executive framed a similar demand for abridgment of the First Amendment rights of American citizens. The Solicitor General, "carefully and emphatically stated":

Now, Mr. Justice [Black], your construction of \*\*\* [the First Amendment] is well known and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious "no law" does not mean "no law" and I would seek to persuade the Court that that is true. \*\*\* [T]here are other parts of the Constitution that grant power and responsibilities to the Executive and \*\*\* the First Amendment was not intended to make it impossible to function or to protect the security of the United States. Id. at 718.

Mr. Justice Black then observed that the Government's claim was founded on the "inherent powers" of the President to preserve the national security, Id., the precise argument once again made in this case. Mr. Justice Black, in his last opinion for this Court, reminded the Nation that:

The amendments were offered to curtail and restrict, the general powers granted to the Executive, Legislative and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Id. at 716 (concurring opinion of Black, I)

and forthrightly rejected the "inherent power" argument of the Government:

To find that the President has the "inherent power" to halt—the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the

very people the Government hopes to make secure. *Id.* at 719.

The decision of the court below is fully within the spirit and sweep of the decision and opinions of his Court last term in New York Times, supra. In the tradition of Marbury v. Madison, Ex parte Milligan, Youngstown Sheet & Tube Co., Powell v. McCormack, all supra, the tradition Mr. Justice Clark called the "finest tradition of this Court," Baker v. Carr, 369 U.S. 186 (1962), the Court of Appeals firmly and with courage rejected the claim of the Executive to "inherent power" to suspend the mandates of the Fourth Amendment in the name of the threat of "domestic subversion." The words of the Court below echo the resolute words of this Court throughout its history when faced with similar challenges to the fundamental principle that this is a government of law and not men.

But what we cannot conceive is that in the midst of the turmoil of the present day, the courts of the United States should suspend an important principle of the Constitution. We hold that in dealing with the threat of domestic subversion, the Executive Branch of our government, including the Attorney General and the law enforcement agents of the United States, is subject to the limitations of the Fourth Amendment to the Constitution when undertaking searches and seizures for oral communications by wire. App. at 62-63.

3. The claim of power of the Executive offends against the fundamental principles of separation of power and limited sovereignty established in established in the first days of the Republic.

With deep insight the Court below recognized that this case "has importance far beyond its facts or the litigants concerned," that it touches, as this Court said in Reynolds v. Sims, 377 U.S. 533 (1964), the "bedrock of our political system." In the most profound way this case calls into question the fundamental principles of the Republic, the

continuation of a government of limited and enumerated powers, a government of separate powers, a government in which the written fundamental law is supreme over men in high places who would place their will and their judgment above the guarantees of liberty which the law sets forth.

As the great Chief Justice said in Marbury, the written Constitution set forth the limits, the boundaries of power so that "these limits may not be mistaken or forgotten..." I Cranch at 175. Any "doctrine" which would elevate any branch of the government above the restrictions of the written law, would in Chief Justice Marshall's words "subvert the very foundations of all written Constitutions." Id. at 178. The history of the country, its earliest days, illuminate this teaching of the first Chief Justice. This history reveals that the structure of the new government, based as it was upon the principle of separation of powers, and limited by a Bill of Rights, was constructed for the very purpose of frustrating claims to excessive power of the nature asserted here by the present Executive.

The founders of our country enacted a Constitution vesting a new federal government with certain enumerated powers and creating three coordinate branches of government to share and check the administration of these powers. No absolute authority was lodged in any man or institution. Each branch of government was vested with limited powers derived from the Constitution which was itself the supreme law of the land.

James Madison, one of the drafters of the original Constitution and a foremost proponent of its ratification, argued that the provisions for separation of powers were designed to ensure that the Government indeed exercised its authority within the prescribed bounds.

It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectively restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. Federalist Papers No. 48, p. 308 (Mentor Books, 1961).

Madison quoted Thomas Jefferson's explanation of why the Virginia Constitution provided for a separation of powers, as further authority for the Constitution's provisions for separation of powers. The reason was to provide effective safeguard against tyranny.

An elective despotism was not the government we fought for; but one which should not only be founded on free principles, in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others. For this reason that convention which passed the ordinance of government laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. Thomas Jefferson, Notes on the State of Virginia, p. 195, quoted in Federalist Paper No. 48, p. 310-11.

Nonetheless, a bitter outcry arose in the former colonies when the original Constitution failed to contain a bill of rights restraining the government from abridging individual liberties of citizens in the exercise of its powers. Many opposed ratification for this reason.

James Madison explained the lack of a bill of rights by saying that the new government was one of specific and enumerated powers, and since the powers of the government were limited by enumeration, it would be absurd and

unnecessary to add an additional section specifying what it could not do. Yet, later Madison himself was to concede the need for a bill of rights:

I do conceive that the Constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done, while no one advantage arising from the exercise of that power shall be damaged or endangered by it. Annals of Congress, 1st Congress, 1st Session, at 432.

This lack of restraint upon the government afforded by the Constitution was the subject of attack by many newspapers and pamphlets during the period before ratification. In his "Letters of a Federal Farmer," Richard Henry Lee noted the need for a bill of rights (including protection against unreasonable searches) by stating:

[T]here are ... essential rights, which we have justly understood to be the rights of freemen; as freedom from hasty and unreasonable search warrant, warrants not found on oath, and not issued with due caution, for searching and seizing men's papers, property, and persons. R. H. Lee, "Letters of a Federal Farmer," Letter IV, in Ford, Pamphlets on the Constitution, 315 (1888).

Our countrymen are entitled to an honest and faithful government; to a government of laws and not of men; . . . I wish to see these objects secured, and licentious, assuming, and overbearing men restrained; if the constitution or social compact be vague and unguarded, then we depend wholly upon the prudence, wisdom and moderation of those who manage the affairs of government; or on what, probably, is equally uncertain and precarious, the success of the people oppressed by the abuse of government, in receiving it from the hands of those who abuse it, and placing it in the hands of those who will use it well. *Id.*, Letter V, at 324.

In the ten-month struggle for ratification in the state conventions, absence of a federal bill of rights became the strongest point of attack upon the Constitution by the Antifederalists. In examining the debates in the state ratifying conventions, it first must be noted that many of the states had their own Bills of Rights including provisions against general warrants.<sup>24</sup>

<sup>24</sup>That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted. (Virginia Bill of Rights of 1776)

That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or other property, not particularly described, are contrary to that right, and ought not to be granted. (Pennsylvania Constitution of 1776)

That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the persons in special—are illegal, and ought not to be granted. (Maryland Declaration of Rights of 1776)

That general warrants—whereby an officer or messenger may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons, not named, whose offences are not particularly described, and supported by evidence—are dangerous to liberty, and ought not be granted. (North Carolina Declaration of Rights of 1776)

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws. (Massachusetts Constitution of 1780)

In the Virginia State Convention of 1788, Patrick Henry pointed to the Virginia State Constitution which did contain a bill of rights and warned that the new federal constitution would destroy the liberty of the people.

In the present Constitution [of Virginia] they [the authorities] are restrained from issuing general warrants to search suspected places, or seize persons not named, without evidence of the commission of a fact, etc. There was certainly some celestial influence governing those who deliberated on that Constitution; for they have, with the most cautious and enlightened circumspection, guarded those indefeasible rights which ought ever to be held sacred! The officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitations of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into your cellars and rooms, and search, ransack, and measure everything you eat, drink, or wear. They ought to be restrained within proper bounds. Elliot, Debates on the Adoption of the Federal Constitution, III, at 448-449.

Virginia ratified the Constitution by a close vote of 89-79, but accompanied the ratification with a statement, "that there be a Declaration or Bill of Rights asserting and securing from encroachment the essential and unalienable Rights of the People in some such manner as the following."<sup>25</sup>

The New Hampshire Constitution of 1784 repeats the above provision of the Massachusetts Constitution of 1780. The Vermont Constitution of 1786 repeates the above provision from the Pennsylvania Constitution of 1776.

<sup>25</sup>The proposed list of amendments included the following: Fourteenth, that every freeman has a right to be secure from all unreasonable searches and seizures to his person, his papers, and his property; all warrants, therefore, to search suspected places, or seize any freeman, his papers or property, without information upon Oath... of legal and sufficient cause are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous and ought not be granted.

New Hampshire ratified with the following protective provision:

And as it is the Opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good People of the State and more Effectually guard against an undue Administration of the federal Government.

Ratification was secured in the populous states of Massachusetts and New York, only with similar inclusion of proposed amendments and some insurances by the Federalists of their eventual adoption. Kelly & Harbison, The American Constitution: Its Origins and Development, 148-166 (1963). North Carolina refused to ratify, but instead adopted a resolution calling for the adoption of a bill of rights. 27

Thus, with the desires of many states so expressed, James Madison, at the opening session of the first Congress, took the initiative in advocating amendments, including what was to become the Fourth Amendment, limiting the Government's power to intrude upon individual and political rights.

<sup>&</sup>lt;sup>26</sup>New York ratified with the following declaration: Under these impressions and declaring that the rights aforesaid cannot be abridged or violated, and that the Explanations aforesaid are consistent with the said Constitution, and in confidence that the Amendments which shall have been proposed to the said Constitution will receive an early and mature Consideration.

Massachusetts ratified and repeated the opinion enunciated by New Hampshire.

<sup>&</sup>lt;sup>27</sup>That a Declaration of Rights, asserting and securing from encroachment the great Principles of civil and religious Liberty, and the unalienable Rights of the People, Together with Amendments to the most ambiguous and exceptional Parts of the said Constitution of Government, ought to be laid before the Congress, and the Convention of the States that shall or may be called for the Purpose of Amending the said Constitution, for their consideration previous to the Ratification of the Constitution aforesaid, on the part of the State of North Carolina.

I believe that the great mass of the people who oppose it [the Constitution] disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we to consider them safe, while a great number of our fellow citizens think these securities necessary. Annals of Congress, 1st Congress, 1st Session, at 433.

In September, 1789, Congress submitted the proposed amendments to the States, and in November, 1791, ratification was completed making them part of the Constitution.<sup>28</sup>

The history of the ratification period shows an overriding concern by the Framers to delineate clearly the scope of governmental authority and to protect individual freedoms by imposing restraints on its exercise. There is no room here, as suggested by the present Executive, for an assertion of any "fundamental" or "inherent" authority of the federal government or any part of it to erode or ignore these restraints. It is against this history that the claims of the Government must be measured.

Rights solidified support for the Constitution and served to strengthen the new federal government. As a result, North Carolina and Rhode Island ratified the Constitution and joined the Union. The factions adverse to the federal government lost their strength and unity. The significance thereafter of the Bill of Rights to the viability of the new Union has been thus described:

The reaction to the adoptment of the amendments was immediate. The popularity of the Constitution increased tremendously. As history has shown, it was indeed fortunate for the new Union, which was soon again torn with so much dissension, that this should be so. The leaders who had opposed the Constitution were still dissatisfied, for they had insisted upon changes in its framework as well. But their strongest bid for popular support was gone. They could no longer appeal to that defect in the new regime which the public in general could most appreciate and understand. Without this popular support, the backbone of forces arrayed against the Constitution was broken. Lasson, supra, at 104-5.

The Executive's bid for uncontrolled power to conduct domestic espionage against dissident citizens without regard for limitations of the Fourth Amendment flies in the face of the most fundamental traditions of the nation. It contradicts the most elementary lessons of our history.

The government's assurances that it will not abuse the awesome and unchecked powers it seeks here (Government's Brief at 35) are also answered by our history. The Framers were well aware that governmental power is always subject to abuse and for that reason limited its exercise by the Bill of Rights and the checks created by its division among the three branches of government. See New York Times v. United States, supra, (opinion of Mr. Justice Black). In this respect, the remarks of Elbridge Gerry, a distinguished delegate from Massachusetts to the Philadelphia Constitutional Convention are instructive:

This people have not forgotten the artful insinuations of a former Governor, when pleading the unlimited authority of parliament before the legislature of Massachusetts; nor that his arguments were very similar to some lately urged-by gentlemen who boast of opposing his measures, 'with halters about their necks.'

We were then told by him; in all the soft language of insinuation, that no form of government of human construction can be perfect-that we have nothing to fear-that we had no reason to complain-that we had only to acquiesce in their illegal claims, and to submit to the requisition of parliament, and doubtless the lenient hand of government would redress all grievances, and remove the oppressions of the people: -Yet we soon saw armies of mercenaries encamped on our plains-our commerce ruined-our harbours blockaded-and our cities burnt.... Let the best informed historian produce an instance when bodies of men were entrusted with power, and the proper checks relinquished, if they ever found destitute of ingenuity sufficient to furnish pretences to abuse it. And the people at large are already

sensible, that the liberties which Americans claimed, which reason has justified, and which have been so gloriously defended by the swords of the brave; are not about to fall before the tyranny of foreign conquest; it is native usurpation that is shaking the foundations of peace, and spreading the sable curtain of despotism over the United States. Gerry, "Observations on the New Constitution," in Ford, supra at 16.29

The words of Elbridge Gerry are eloquent answers to the assertion of today's Executive that power should not be denied to him because of the fear of abuse. (Government's Brief at 35). A people, to remain free, must never permit "the proper checks [to be] relinquished," lest, in his impassioned words, the "sable curtain of despotism" be spread "over the United States."

The men who wrote our Constitution were aware of the tendency of rulers to equate dissent against their policies with sedition and treason. No less were they mindful of the need to empower the new government with the means of self preservation in the difficult years following the Revolution. "The Constitution was written so as to strike a balance between the protection of political freedom and the protection of the national security interest. To guarantee political freedom, our forefathers agreed to take certain risks which are inherent in a free democracy." United States v. Smith (C.D. Cal. No. 4277-CD, Jan. 8, 1971). (Ferguson, J.). Benjamin Franklin expressed this philosophy in now familiar words:

They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety. Historical Review of Pennsylvania cited in J. Bartlett, Bartlett's Familiar Quotations 227 (C. Morley & L. Everett ed. 1951).

<sup>&</sup>lt;sup>29</sup>Gerry was speaking of the colonial Massachusetts experience with the hated writs of assistance under the governorship of Francis Bernard.

And as Mr. Justice Brandeis wrote in words which have become immortalized in opinions of this Court, "those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." Whitney v. California, 274 U.S. at 377 (concurring opinion).

The Fourth Amendment exemplifies the Framer's considerations of the proper balancing of the interests of liberty and safety. The Government is enabled to obtain authorization of a search upon a proper showing, but the warrant requirement stands as a protection of the citizen against arbitrary invasion of his or her privacy. Those who won our independence by revolution, in Justice Brandeis' words, were not cowards.

The men who wrote our Constitution for the people they represented determined to take certain risks inherent in a free democracy by imposing restraints on the new government by the Bill of Rights, and in doing so they actually strengthened the security of the nation. See Stromberg v. California, supra.

We urge the Court to consider carefully this history in deciding this case. In recent years, large numbers of American citizens have come to question whether the United States has abandoned its historic ideals of liberty and self-determination in the seemingly endless prosecution of the Vietnam war and repression of those who dissent against government policies. A decision by this Court affirming the traditional guarantees of the Fourth Amendment and the subordination of the Executive Branch to the Constitution and the rule of law would be an essential reaffirmation of the principles of liberty born in "revolution on this Continent," Coolidge v. New Hampshire, supra, at 455, and would, in the deepest sense of the word, strengthen the Republic.

For this Court to reaffirm the bounds and limits which the written Constitution places upon the Executive would be to "preserve" the system of government in the original.

meaning of the Founders of the nation. As James Madison placed it in words perhaps uncommonly blunt:

"The preservation of a free government requires not merely that the metes and bounds which separate each department of power may be invariably maintained; but especially that neither of them be suffered to overleap the great barrier which defends the rights of the people. The rulers who are guilty of such an encroachment exceed the commission from which they derive their authority and are tyrants." Madison, Memorial and Remonstrance, Vol. II, Writings of Madison, 183-191 (A. Hunt, ed. 1901).

Upon this Court has been placed the "ultimate responsibility," Marbury v. Madison, Powell v. McCormack, supra, to guarantee that a branch of government, not even the Executive, Youngstown Sheet & Tube Co. v. Sawyer, supra, "be suffered to overleap the great barrier which defends the rights of the people," Madison, supra. In this lies the true protection of the Republic.

The preservation of the strength and security of this nation has never rested in the hands of a few men in public office; it lies in the freedoms of the people as enacted in a Constitution and its Bill of Rights. When America rejected colonial tyranny and George the Third, it assumed certain risks as a small price for freedom.

In the words of the Court below:

It is strange indeed that in this case the traditional power of sovereigns like George III should be invoked on behalf of an American President to defeat one of the fundamental freedoms for which the founders of this country overthrew King George's reign. App. 60.

4. The last minute efforts of the Government to interject considerations of "foreign security" into this case are totally unsupported by the record and must be rejected as a desperate attempt to camouflage the illegality under the Fourth Amendment of the warrantless surveillances involved.

As a last minute effort to sustain the legality of these wiretaps the Executive argues in this Court that because a distinction between foreign and domestic considerations is artificial and insupportable, "both on the facts of this case and in most (if not all) national security cases within the congressionally defined areas of concern," a prior judicial warrant is not required by the Fourth Amendment in the area of "domestic security" problems. Government's Brief, at 30-31. To arrive at this startling conclusion, the Executive reasons that, "[f]oreign and domestic intelligence activities are interrelated aspects of the broad function of proteeting national security." Id. at 31. This argument is interwoven throughout the Government's brief (e.g., Government's Brief at 16, 17, 18, 20, 23, 24, 27, 29, 30-31) in an attempt to buttress as a last resort the Executive's unprecedented claim in this case that domestic "national security" electronic surveillance without prior judicial sanction is permissible under the Fourth Amendment.

1) This contention of the Government that foreign security considerations are involved in this case is in direct contradiction to the Government's own characterization of the issues in the course of the litigation. The affidavit of the Attorney General filed in the District Court explicitly states that the electronic surveillances at issue were directed toward domestic organizations. The taps:

were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government. The records of the Department of Justice reflect the installation of these wiretaps has been expressly approved by the Attorney General. Affidavit of Attorney General App. at 20-21 at para. 3 (emphasis added)

Thus, the Government's own stated "purpose" for conducting the surveillance in the first place completely contradicts its present efforts to interject the issue of "foreign security." The Government's after-the-fact characterization of its own illegal activities can scarcely control the legal analysis of the situation. Cf. United States v. Stone, 305 F.Supp. 75, 80 (D.C. D.C. 1969). See also Cole v. Arkansas, 333 U.S. 196 (1948). 30

The courts below accepted the sworn statement of the Attorney General at face value and properly concluded that the issue in this case concerns only the President's alleged powers in domestic security matters. (E.g., App. at 30-31, 47, 51, 63-64).

The Government has at this late stage in the proceedings attempted to interject the issue of foreign security electronic surveillance into this case by referring the Court to the record in the Ferguson case, now pending before this Court on a petition for a Writ of Certiorari, Ferguson v. United States, No. 71-239. (Government's Brief at 30, n.13). It is not clear from this footnote in the Government's Brief whether the Government is claiming that "the surveillance in question" (as to defendant Plamondon) is the same surveillance referred to in the next paragraph of the footnote described as the "additional record of conversations overheard during this surveillance," Id. at 30, n. 19.

Of course, the logs in both cases are available only to the Government and this Court so respondents cannot make their own factual determination as to the connection, if any, between the *Plamondon* logs and the record in the *Ferguson* case. But whether the Government or this Court should

<sup>&</sup>lt;sup>30</sup>It would totally violate the fundamental concept of notice guaranteed by the Due Process Clause of the Fifth Amendment for the Government to be permitted to retroactively restate here at the final appellate stage its alleged purpose in engaging in the electronic eavesdropping.

consider the surveillances in *Ferguson* and *Plamondon* to be the same surveillance or not, several alternative conclusions flow from the Government's statements of fact which are equally fatal to its own position.

- The Attorney General's affidavit in the Ferguson case, United States v. Smith; supra, describes the "purpose" of the surveillance in question as being to eavesdrop on a domestic organization which may "use unlawful means to attack and subvert the existing structure of government" (Appendix A to this Brief). The Government has therefore attempted to alter its own prior "purpose" which was to snoop on a domestic organization, compare United States v. Stone, supra, by reforumlating its "purpose" as one involving foreign security. The Executive has sought to accomplish this redefinition of the Ferguson-Smith litigation by attempting to file further logs in the Ninth Circuit Court of Appeals, Government's Brief at 30, n. 13, a highly suspect practice. Cf. Cole v. Arkansas, supra. This was a bootstrap operation at best for the Ferguson case and when used to bolster a record of surveillance which occurred many months earlier in this case, a surveillance already described as having a "domestic" security "purpose" by the Attorney General's own sworn affidavit, it constitutes a twice removed effort at retroactively creating a record of foreign security surveillance where none in fact originally existed.
- b) In the alternative, if the Court examines the logs in the Ferguson and the instant case and finds that they are not of the same surveillance, then the Ferguson record is irrelevant to the Court's consideration here of the legality of the domestic security surveillance in the Keith case.
- c) It seems probable that the Executive is characterizing the surveillance revealed in note 13 as one continuing surveillance. If this is so, the Executive has admitted to a surveillance program of extraordinary duration and enormous breath as "This surveillance" and "the surveillance in question." If it is describing simply one "surveillance," the overbreadth of this program, its lack of particularity and its rejection of any concept of probable cause, renders it

wholly violative of the First and Fourth Amendments. See Points I A, B, (1), (2) supra. Compare the Government's Brief at 31, n. 13 indicating 952 overheard phone calls in a fourteen-month period of this surveillance with Government's Brief at 27, n.10 alleging only 36 national security telephone surveillances operated by the FBI in 1970.

2) The Government suggests that this Court has left open the question of the legality of warrantless domestic national security surveillance of the sort at issue here. This is a total misstatement of the decisions of this Court. If there is anything at all left undecided by the Court in its determinations of the illegality of warrantless electronic surveillance, it is only the narrow and limited question of the legality of warrantless foreign security surveillance.

Even as to this narrow question, the Court has never either acknowledged or ruled upon the power of the President to conduct warrantless foreign security surveillance. See Giordano v. United States, 394 U.S. 310, 314 (1969), Katz v. United States, supra, United States v. Clay, 430 F.2d 165, 170 (5th Cir. 1970), reversed on other grounds 403 U.S. 698 (1971). Therefore, the Government's premise that "a warrant would not be required for surveillance involving foreign intelligence operations...", Government's Brief at

<sup>&</sup>lt;sup>31</sup>The position of the Government that warrantless electronic surveillance of domestic organizations should be sanctioned by this Court is contrary to the standards adopted by the American Bar Association in 1971 (ABA Project on minimum standards for Criminal Justice, Standards Relating to Electronic Surveillance, Sec. 3-1 (Final Draft 1971)).

The standard defines national security as external to foreign affairs (Tent. Draft at 121, June 1968). The Committee rejected any inherent power in the President to deal with domestic subversive groups. Tent. Draft, supra.

When the standard was adopted by the House of Delegates, former American Bar Association President, Lewis Powell, Jr. remarked:

<sup>&#</sup>x27;The standards with respect to subversion . . . do not apply to domestic subversion—only to foreign attack." Reported in 8 Cr.L. Rep. 2371, 2372 February 17, 1971.

30, is not based on the decisional law of this Court and does not support its bootstrap argument that "Foreign and domestic intelligence activities are interrelated aspects of the broad function of protecting national security," Id. If anything, the few lower court cases cited by the Executive, United States v. Clay, supra, United States v. Stone, supra, United States v. O'Baugh, 304 F.Supp. 767 (D.C. D.C. 1969), United States v. Butenko, 318 F.Supp. 66 (D. N.J. 1970), which hold warrantless foreign security wiretaps to be legal, all carefully restrict the holding of legality to narrowly defined foreign security surveillance. See Giordano v. United States, supra, Mr. Justice Stewart concurring.

An inquiry as to precisely what has been left open by this Court must start with the dissenting opinion of Mr. Justice White in Berger v. New York, supra. Mr. Justice White believed that the Court's far-reaching opinion in Berger, supra would, sub silentio, determine the unreasonableness and illegality of the Government's program of warrantless foreign security electronic surveillance for which the Executive Branch was then seeking legislative sanction from the Congress. Id. at 107, 116.

He wrote of the proposed legislation aimed at protecting against the "grave threat to the privacy and security of our citizens," posed by unregulated wiretapping. Id. at 112. He urged the Court, "to deal with the facts of the real world" in determining the reasonableness of wiretaps under the Fourth Amendment. Id. at 114. These facts included a recognition that the Government at the time of the decision in Berger, supra, was proposing legislation to the Congress prohibiting most wiretapping, but the prohibitions of the proposed bill (H.R. 5386 and S. 928 § 3) did not apply to interceptions in so-called foreign security cases. Mr. Justice White described the Bill:

Apparently, under this legislation, the President without court order would be permitted to authorize wiret pping or eavesdropping "to protect the nation against actual of potential attack or other hostile acts of a foreign power or any other serious

threat to the security of the United States or to protect national security information against foreign intelligence activities. *Id.* at 115.

According to Mr. Justice White, the proposed foreign security exception would allow the Attorney General to exercise the President's powers in wiretapping, in cases like "sabotage and investigations of organizations controlled by a foreign government." Id. at 115. Even such foreign security surveillance would be for purposes of investigation alone and not for prosecution. Information thereby obtained would not be admissible into evidence in a criminal proceeding. Id. at 116. Mr. Justice White believed the Court's decision in Berger could well determine the question of the reasonableness, sub silentio, of such foreign security surveillance.

In its subsequent opinion in Katz v. United States, supra at 358, n. 23, the Court, in the opinion of Mr. Justice Stewart, made it clear that the only issue remaining open was the narrow question of the legality of foreign security surveillance. Mr. Justice White expressed his views (concurring opinion at 364) and Justices Brennan and Douglass disagreed, Id. at 359. We are reminded as to what issue is left open in Berger and Katz by Mr. Justice Stewart in Giordano v. United States, supra.

Finally, the Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information—necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage. MR. JUSTICE WHITE has elsewhere made clear his view that such surveillance does not violate the Fourth Amendment, 'if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.' While two members of the Court have indicated disagreement with that view, the issue re-

mains open. 394 U.S. at 314 (concurring opinion of Stewart, J.) (Emphasis added, footnotes omitted)<sup>32</sup>

The decisions of this Court thus demonstrate that all that remains "open" is the narrow question of legality of warrantless electronic surveillance relating to the gathering of foreign intelligence information. It has never been suggested by this Court or any of the Justices that the kind of domestic security surveillance engaged in here by the Attorney General of "domestic organizations" which may "attempt" to "attack and subvert the existing structure of the government," Affidavit of Attorney General, App. 20, has in any way been left open by the decisions of this Court.

3) The Government has relied upon a number of cases dealing with the war power as authority for its argument that the President's power in the foreign relations area is too intertwined with domestic issues as to make distinction impossible. These cases are urged to support the proposi-

<sup>32</sup> It has been suggested that Mr. Justice White may have reconsidered his views as to the constitutionality of even the narrow kind of electronic surveillance "relating to the gathering of foreign intelligence information," Giordano v. United States, supra, that Mr. Justice Stewart suggests may have been left open by the Court. Mr. Justice White, in his opinion for the Court in Alderman v. United States, supra at 184 ordered disclosure to a defendant in a criminal case of all surveillance logs gathered illegally including those where disclosure may involve the national security. The absolute disclosure requirement of Alderman even in the narrow area of surveillance "relating to the gathering of foreign intelligence information" is predicated on the illegality of such surveillance and as such may be a rethinking of the original reservations in this regard by Mr. Justice White. Judge Ferguson suggested in United States v. Smith, 321 F.Supp. at 426, supra, that:

In Alderman, Justice White suggested that in light of the disclosure requirement the government might have to dismiss certain cases "in deference to national security." This seems to suggest that he may have reconsidered this initial position, since under it national security cases would be almost per se lawful, and therefore not subject to the disclosure requirement.

Cf. also n. 13 in the Alderman opinion, 394 U.S. at 181.

tion that "This Court has recognized the President's authority and duty to collect and utilize intelligence information so that he can properly fulfill his constitutional responsibilities." Government Brief at 16. But none of the cases cited by the Government (See n. 4, Government's Brief) involve the collection and utilization of intelligence information at the expense of fundamental rights of citizens guaranteed by the Constitution.<sup>33</sup>

Moreover, none of these decisions support the extraordinary proposition advanced by the Executive in this case that the admittedly broad powers of the President in the conduct of foreign affairs, cf. United States v. Curtiss-Wright Corp., supra, are so intermingled with domestic questions as to make distinction impossible. Quite to the contrary, these cases teach incisively that the foreign affairs power must be sharply differentiated from the President's powers in domestic affairs, or else the entire concept of a government of limited powers with a separation of functions will vanish. Cf. Youngstown Sheet & Tube Co. v. Sawyer, supra, and that even as to the broad foreign affairs power

<sup>33</sup> Four of the cases cited involve facts relating solely to the President's powers in foreign affairs; powers relating to the recognition of foreign governments, the making of treaty agreements and negotiations with a foreign government. Oetjen v. Central Leather Co., 246 U.S. 297 (1917); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936); United States v. Belmont, 301 U.S. 324 (1936); United States v. Pink, 315 U.S. 203 (1941). Two of the cases concern the powers of the President as Commander-in-Chief of the Armed Forces; his authority over military installations, Cafeteria Workers v. McElroy, 367 U.S. 886 (1960), and the power of the President to withhold the grant of a license to an air carrier seeking permission to fly a foreign air route. Chicago & Southern Air Lines Inc. v. Waterman Steamship Corp., 333 U.S. 105 (1947). In the latter case, the President's military power as it relates to the granting of foreign aerial routes is intimately tied to the Government's plans for national defense in military matters.

In re Debs, 158 U.S. 564 (1894), involved the question of whether the President could properly seek injunctive relief against railway employee's obstruction of interstate commerce as an exercise of his power over such commerce, or whether to do so would infringe upon the state's sovereignty.

this is limited by the express prohibitions of the Constitution. United States v. Curtiss-Wright Corp., supra 34'

The power of the President as Commander-in-Chief is similarly limited by the Constitution. Youngstown Sheet and Tube Co. v. Sawyer; supra. 35

34 In Curtiss-Wright, supra, 299 U.S. at 315-321, the Court distinguished between the President's power in the area of foreign affairs and his power over domestic affairs. Only in the former is the President's power inherent, and therefore not to be found within the enumerated powers in the Constitution. Even accepting this broad interpretation of Presidential power, it is clear that he may not act contrary to the express prohibitions of the Constitution. Justice Sutherland expressly qualified the concept of inherent power when he stated: "a power which ... like every other governmental power must be exercised in subordination to the applicable provisions of the Constitution." Supra, 299 U.S. at 320. It should be noted that the historical analysis employed by Justice Sutherland to justify the concept of inherent power has been criticized as being factually erroneous. See Levitan, "The Foreign Relations Power: An Analysis of Mr. Sutherland's Theory," 55 Yale L.J. 467 (1946) and Patterson, "In Re the United States v. Curtiss-Wright Corp.," 22 Tex. L. Rev. 286, 445 (1944).

In United States v. Belmont, supra, the Court specifically stated that the question of rights under the Due Process Clause of the Fifth Amendment was not raised therein, supra, 301 U.S. at 332. In United States v. Pink, supra at 228, the Court found no unconstitutional deprivation of property in violation of the Fifth Amendment. Implicit in these decisions, is the constant recognition by the Court that if there were such violations, the Presidential power could not be upheld.

<sup>35</sup>In Cafeteria & Restaurant Workers Union v. McElroy, supra, the Court found that the petitioner was not denied her rights under the Due Process Clause of the Fifth Amendment since employment at a military installation is a privilege rather than a constitutional right.

The factual situation involved in Chicago and Southern Air Lines v. Waterman Corp., supra, is distinguishable from this case in that the former involved the denial of a licensing privilege, as opposed to the denial of a Constitutional right, as a result of the exercise of the President's power as Commander-in-Chief.

In re Debs, supra, stands only for the proposition that the Government may exercise power where such power has been Constitutionally None of the cases relied upon by the Government lend any support to the claim that the broad foreign affairs power is so intermingled with domestic questions as to erase constitutional limitations in that area. Such a doctrine would in the warning words of Justice Story "clothe" the President "with an absolute despotic power over the lives, the property, and the rights of the whole people." Story, supra, at p. 177. Every decision of this Court touching the powers of the Executive seeks to guard against precisely the concepts urged by the Government in this case. Ex parte Milligan, Youngstown Sheet and Tube, New York Times v. United States, all supra.

4) The government has further argued that its present practices of electronic surveillance of domestic organizations are merely a continuation of the policies of previous administrations. In support of its argument, it has submitted a series of memoranda written by Presidents from Roosevell to Johnson. In fact, these memoranda and the legislative history reveal a longstanding practice of never prosecuting where warrantless electronic surveillance had been conducted.

Until the present administration took office, no President or his Attorney General ever advocated that warrantless electronic surveillance for the purpose of protecting the national security could be used in a judicial proceeding. The choice of the Executive was to investigate or prosecute, never both. This recognition encompassed so-called foreign security electronic surveillances. The decision of this Court in Nardone v. United States, 302 U.S. 379 (1937) was taken by successive administrations to mandate a blanket prohibition against revelation of wiretap and other electronic surveillance activities in judicial proceedings including electronic surveillance for national security purposes.

granted. It offers no support for the argument that Constitutionally granted power may be exercised in derogation of Constitutional rights.

It is also perfectly clear that because past administrations were unhappy with the holding in *Nardone*, *supra* which made prosecution in foreign security cases impossible, they therefore asked the Congress for legislation allowing the Government to prosecute utilizing its information gathered by warrantless electronic surveillance in these circumstances. See, e.g., Rogers, "The Case for Wiretapping," 63 Yale L.J. 792 (1954); Brownell, "The Public Security and Wiretapping," 39 Cornell L.Q. 195 (1954). However, legislative authorization for the use of such warrantless electronic surveillance never was enacted. See Point II, *infra*.

Until very recent days the Government never claimed that it could both engage in warrantless electronic surveillance and prosecute.<sup>36</sup> This recognition of the blanket prohibition of *Nardone* was applied with full force even in foreign security cases.<sup>37</sup> This is reflected in the exchange of memo-

<sup>&</sup>lt;sup>36</sup>See the dialogue between this Court and the Solicitor General, as quoted by Mr. Justice Stewart, on this issue in *Giordano v. United States*, supra at 313, n. 1.

<sup>&</sup>lt;sup>37</sup>See the discussion of the Coplon case, United States v. Coplon, 185 F.2d 629, 636 (2nd Cir. 1950), cert. den., 342 U.S. 920 (1952) by Attorney General Brownell in 39 Cornell L.Q., supra at 200, n. 22. See also the dialogue between this Court and the Solicitor General in Giordano, supra, concerning the Butenko case, supra, which was clearly concerned with foreign security. There is no basis to the argument by the Executive that Nardone v. United States, supra, merely prohibited disclosure of illegal surveillance activities in a criminal case but allowed for so-called investigative surveillance if the seized information was only disclosed among members of Government agencies. See the Brownell and Rogers articles, both supra. This seems to be a questionable reading of Sec. 605 of the Communications Act. See the 2nd Nabdone case, 308 U.S. 338 (1939) and Gouled v. United States, 255 U.S. 298 (1921). More importantly, Katz v. United States, 389 U.S. 347 (1967), decides the question of the legality of electronic surveillance in constitutional Fourth Amendment terms so the invasion of privacy occurs whether revelation of the seized materials is in a criminal case or merely to the Government agent performing the task of listening in on the private utterances. And, of course, the remedies available to one whose conversations are overheard are Besides a motion to suppress illegally seized evidence, Katz, supra, there are damages remedies, 18 U.S.C. 2510, et seq. See. also Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

randa the Government has alluded to as its authority for a program of domestic security surveillance. (See App. 68-72.) This exchange of memoranda is consistent with the recognition by past Attorneys General and Presidents that such investigative surveillance obviates the possibility of prosecution where disclosure must necessarily occur. Moreover, the memoranda reflect a limitation of such surveillance to the narrow area of foreign security as defined by Justice Stewart in his concurring opinion in Giordano, supra.

In January 1969 the new administration for the first time since the decision of this Court in Nardone openly asserted that its warrantless wiretapping activities in the narrow area of foreign security did not foreclose criminal prosecution in such cases.<sup>38</sup>

This new departure of the Administration reflected a dissatisfaction with the decision of this Court in Alderman requiring disclosure of the contents of surveillances where such interceptions, even in the foreign security area, are found to be illegal under the Fourth Amendment. In writing for the Court in Alderman, Mr. Justice White had applied the disclosure requirement to illegal surveillances even where the disclosure might damage the national security. The alternative to disclosure, as conceded by the Executive in Alderman, was dismissal of the indictment. Alderman, supra, at 181, 184. This requirement of full disclosure applied to foreign security cases as well as all others whenever the surveillance is illegal. The opinion of the Court in Alderman, supra, held that the mere assertion by the Ex-

<sup>&</sup>lt;sup>38</sup>See generally, United States v. Stone, supra; United States v. O'Baugh, supra; United States v. Clay, supra; United States v. Brown, 317 F.Supp. 531 (D. La. 1970); United States v. Rutenko, supra; United States v. Hoffman, D.D.C. No. 97331 (decided November, 1971).

<sup>&</sup>lt;sup>39</sup>Compare the opinions of Mr. Justice Harlan and Mr. Justice Fortas on the question of disclosure in foreign security cases, *Id.* at 187, 197 and 200, 209 respectively.

ecutive that a particular foreign security surveillance is lawful does not thereby foreclose review. The Court's opinion even contemplates circumstances where foreign security surveillance, the only question left open by the Court (see pp. 92-95, supra), will have to be disclosed upon a finding of illegality:

The Government concedes that it must disclose to petitioner any surveillance records which are relevant to the decision of this ultimate issue. And it recognizes that this disclosure must be made even though attended by potential danger to the reputation or safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information. Alderman, supra at 181.

This absolute fequirement of disclosure as set forth in Alderman, supra, which contemplates disclosure even in foreign security surveillance situations, can only mean one thing the mere assertion of the Attorney General of legality can never control. Courts are required to make an independent inquiry of their own and Alderman holds that in some circumstances, at least, the Government, in the interest of foreign security considerations, will have to accept dismissal of the indictment as the only alternative to disclosure. Cf. Coplon v. United States, supra (opinion of Judge Hand).

. This Court has not as yet spelled out the precise boundaries of the foreign security situation, cf. Giordano v. United States, supra, a question which, as we have pointed out above, is not involved in the present appeal.

What is astounding, however, is that prior to any adjudication by this Court as to the legality of any "exception" to the Fourth Amendment requirements in the area of foreign security, the new administration, shortly after its unprecedented assertion of a supposed "foreign security exception," attempted to bootstrap its argument into a claim that this new exception not yet even ruled upon by the Court, bottomed a far broader claim of power to sanction

in criminal proceedings warrantless electronic surveillance based solely upon the determination by the Attorney General that citizens were involved in purely domestic "attempts" to "subvert the existing system of government." This incredible attempt to parley a foreign security exception not yet acknowledged by the Court, into an omniously sweeping bid for power over domestic political opponents, was first made in June 1970 in United States v. Dellinger, N.D. Ill. No. 69 CR 180, the first prosecution under the so-called federal anti-riot statute, 18 USC Sec. 2101 (1968).

Any effort to justify this unprecedented claim of executive power to set aside constitutional limitations in the area of domestic alleged "subversion," whatever that broadly sweeping term means (see Point I-A supra), upon a "foreign security" exception to the Fourth Amendment, is not only based upon an "exception" which itself does not yet exist and is itself not a blanket exemption from Fourth Amendment requirements on the mere say-so of the Attorney-General, see Mr. Justice White's opinion in Alderman, supra, but is a patent attempt to evade the clear teachings of this Court in respect to the powers of the Executive within the framework of a constitutional Republic.

C. The Executive's Claim of Unlimited Power to Engage in General Searches, into the Words, Ideas and Thoughts of Citizens, Unless Rejected by this Court, will be an Instrument for Stifling the Liberties of the People Guaranteed by the First Amendment to the Constitution

The ultimate thrust of this case, as the Court of Appeals so incisively perceived, goes far beyond the rights of the individual respondents before the Court. The Government has seen fit to use this case as the vehicle for propelling a claim of Executive power so ominous in its implications and sweeping in its dimensions that it has transformed this appeal into one of those cases in the history of the Court which touch the "bedrock of our political system," Rey-

nolds v. Sims, 377 U.S. 533 (1964). The Executive has decided, in full consciousness of the extraordinary impact of the position adopted, to press a contention, which if sustained would "strike at the heart of representative government" Harman v. Forsennius, 380 U.S. 528 (1965). This then is one of those cases which due to their "peculiar delicacy," Marbury v. Madison, 1 Cranch 137 (1803), call for the exercise of those powers which flow from the historic role of this Court as the "ultimate interpreter of the Constitution" Baker v. Carr, 369 U.S. 186 (1962).

These awesome and foreboding considerations which sweep far beyond the immediate questions, as serious as they are, which affect the individual respondents, arise from the frank attempt of the Executive to use this case to obtain the sanction of this Court for a program of domestic espionage and surveillance of political opponents to the administration in power unprecedented in our history. The final and ultimate impact of this grasp for excessive and uncontrolled Executive power is not simply to undermine and erase those prohibitions of the Fourth Amendment which this Court has called the embodiment of fundamental principles of liberty, Boyd v. United States, 116 U.S. 616 (1885). Its most serious consequence will be the stifling of those political freedoms guaranteed by the First Amendment to the Constitution upon whose continued vitality and life this Court has warned "lies the security of the Republic;" DeJonge v. Oregon, 299 U.S. 353, 354 (1957) (opinion of Chief Justice Hughes).

The use of excessive and uncontrolled Executive power to sweep aside Fourth Amendment protections against warrantless general searches and seizures as a means of shackling and intimidating a political opposition, thus undermining the solemn guarantees of the First Amendment, is not only the result of the application of contemporary twentieth century lessons based upon European tyrannies to the American scene. It flows from the most important of our own experiences as a people and reflects the central teach-

ing of our own history that arbitrary general searches and seizures have always beens the path to an assertion of tyrannical control over the lives and liberties of the people. It was out of this history of our past, the courageous struggles of John Wilkes and the English people against arbitrary arrest and seizure which as this Court recently pointed out in Powell v. McCormack, 395 U.S. 486 (1969), had such a "significant impact in the American colonies," and the bold and forthright stand of James Otis against excessive Executive power embodied in the writs of assistance and general warrants, see Boyd v. United States, supra, that the understanding emerged that the principles of the Fourth Amendment are the most important safeguards of the liberties and freedoms of the First. It was this understanding which the Court below so eloquently reflected in its statement of the central concept which illuminates the overwhelming importance of unswerving resistance to the Government's claim of power in this case:

That which has distinguished the United States of America in the history of the world has been its constitutional protection of individual liberty. It is this which has created the wonderful diversity of this great country and its many and varied opportunities. It is this which has created Justice Holmes' free market place of ideas from which have come our most signal advances in scientific and technological achievement and in social progress. Beyond doubt the First Amendment is the cornerstone of American freedom. The Fourth Amendment stands as guardian of the First. (emphasis added) App. 61

This insight of the lower court reflects the constant teaching of this Court that the impetus to freedom reflected in our history cannot be artificially segmented into the ten individual amendments which constitute the Bill of Rights. The manifest purpose of all the Amendments was to allow for the continued political security of the people without arbitrary governmental interference. This was understood to be essential to a democratic form of government. Justice Brandeis concurring in Whitney v. California, 274 U.S.

357, 375 (1927), expressed the essence of this philosophy in now classic words, which have been only recently reaffirmed by this Court, Brandenburg v. Ohio, 395 U.S. 444 (1969); New York Times v. United States, 403 U.S. 713 (1971):

They [the Framers] recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

In Stanford v. Texas, 379 U.S. 476 (1965), the Court restated Justice Douglas's words in Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J. dissenting), reflecting the interrelationship of the First, Fourth, and Fifth Amendments, in protecting "the essence of a free government" as expressed in Justice Brandeis's words in Whitney:

These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination, but conscience and human dignity and freedom of expression as well.

And in Marcus v. Search Warrants, 367 U.S. 717 (1961), this Court again restated the fundamental lesson of our experiences that:

Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.

For as the Court went on to state in words which are so critical here:

This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power. Marcus, supra, 729 (emphasis added)

The words of the Court a decade ago in Marcus apply with prophetic force to the program of domestic warrant-less wiretapping the Attorney General has instituted and in this case, seeks sanction for from this Court.

"The "unrestricted power of search and seizure." 367 U.S. at 729, which the government has claimed here, has already led to the use of electronic surveillance without the protection of a "neutral and detached magistrate required by the Constitution," Coolidge v. New Hampshire, 407 U.S. 453, against the widest spectrum of political opposition to the present administration as revealed in presently pending federal criminal proceedings. See Appendix A to this Brief.

In cases all over the country, affidavits similar to the one filed by the Attorney General in this case reveal a broad pattern of surveillance of individuals and groups working against injustice and for social change. See Appendix A. The subjects of the Attorney General's suspicion fall across a wide range—leaders of the anti-war movement, Black militants, Catholic pacifists, proponents of "youth culture" and other sections of the political opposition to the present Administration. Apparently, those who dissent strongly from the Administration's foreign and domestic policies are considered a threat to the "existing structure of the Government" (Affidavit of Attorney General) and become the subjects of surveillance. Simultaneous with these public avowals of warrantless wiretapping in pending criminal pro-

ceedings involving nationally known spokesmen of the growing political opposition to the foreign and domestic policies of the present administration, c.f. United States v Dellinger et al., United States v. Ahmad, et al., No. 14886, (M.D. Pa. 1971), supra, the Executive branch has engaged in an extensive public relations campaign urging its case for the "necessity" to conduct such surveillance in order to "preserve" the nation. 40 These activities, all of which cannot but have the effect of generating a climate in which "fear of internal subversion," cf. Coolidge v. New Hampshire, 403 U.S. at 455, becomes an increasingly dominant factor, offend deeply against the somber warnings of this Court in N.A.A.C.P. v. Button, supra, that the freedoms of the First Amendment "are delicate and vulnerable as well as supremely precious in our society" and "need breathing space to survive." Id. at 433. The program of the executive of widespread and loudly proclaimed warrantless wiretapping of the domestic political opposition, unless decisively repudiated by this Court, will inevitably have a strangling effect upon the "delicate and vulnerable" freedoms of the First Amendment, suffocating the "breathing space" they require "to survive." For of all forms of indirect governmental abridgement of fundamental liberties, electronic surveillance works perhaps the greatest chilling .. effect upon the exercise of First Amendment rights. Cf. Dombrowski v. Pfister, 380 U.S. 479 (1965). The uninvited ear of government means risking disclosure to the world at large ideas and opinions intended only for a limited audience. Surveillance, therefore, inevitably deters the full exchange of ideas that the First Amendment envisions,41 "because of

See for example the speech of the Attorney General before the State Bar Association, Cincinnati, Ohio, April 23, 1971, as released by the Department of Justice.

<sup>&</sup>lt;sup>41</sup> In NAACP v. Alabama, supra, the Court expressly warned against the chilling effect upon First Amendment freedoms caused by disclosure of that which is intended to be kept private: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] . . . effective . . restraint

fear of exposure of . . . beliefs," NAACP v. Alabama, 357 U.S. 449, 463 (1964), to hostile ears. As Professor Westin has pointed out "surveillance of individual and group conduct-a primary means of social control-can be carried to lengths that seriously impair freedom." Westin, Privacy and Freedom (1966). See also Dash, Knowlton and Schwartz The Eavesdroppers, (1959). One of the most incisive analyses of the impact of the growing widespread surveillance of domestic dissidents is that of Circuit Judge Kiley of the Court of Appeals of the Seventh Circuit. Judge Kiley has warned of the increasing danger to political democracy, to freedom itself, flowing from this pattern of surveillance: "it seems enough to contemplate the spectre of a Big Brother observing how we think, feel and act, and the oppressive moral and political climate that would tend to suffocate our freedom" Kiley, Privacy's Last Stand, 26 The Critic 41 (1967).

It is this frank willingness to engage in a program of surveillance which can only "tend to suffocate our freedom," in Judge Kiley's sharp words, that is most disturbing about the Government's position in this case. In its effort to evade the clear requirements of the Fourth Amendment, an independent magistrate, probable cause, and particularity, see Point I, B supra, the Government blandly argues that the surveillance program is unrelated to any criminal prosecutorial function but is "merely" an investigative "intelligence gathering operation" required to protect the "security" of the nation. But to escape the strictures of the Fourth Amendment, the Government acts as if the First Amendment was non-existent. The Government's brief in this case reads as if the Executive has limitless uncontrolled

on freedom of association. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." Id. at 462.

powers in the area of political association, beliefs and activities, all of which are affected by an "unrestricted power of search and seizure," Marcus v. Search Warrant, supra at 729, as long as these general searches are conducted unrelated to the purposes of immediate criminal prosecution. We doubt if a more incredible, and more frightening argument has ever been seriously advanced in this Court. Governmental action which impinges upon the "delicage and vulgerable" freedoms of the First Amendment, NAACP v. Button, supra, is constitutionally tolerated if at all only when required to prevent imminent lawless action." Brandenburg v. Ohio, 395 U.S. 444 (1970). See also Baggett v. Bullitt, 377 U.S. 360.

This Court in Brandenburg has now fully embraced the famous concurring opinion of Mr. Justice Brandeis, in Whitney v. California, 274 U.S. 357 (1927). The lesson there is that speculative fears of dissent or even disorder do not justify infringement upon First Amendment liberties: "Those who won our independence... valued liberty both as an end and as a means." Whitney, supra at \$75. This Court has taught time and time again that our form of government requires courage and that we must not capitulate to fear. In the words of Mr. Justice Brandeis,

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men with confidence in the power of full and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Id. at 377.

Warrantless wiretapping, an "instrument" of "oppression and tyranny" in Justice Brandeis' own words, Olmstead v. United States, supra, is a classic feature of the "repression" which "breeds hate" Whitney v. California, supra, at 375 (concurring opinion of Justice Brandeis), and the "hate [which] menaces stable government," 274 U.S. at 375. It is a central characteristic of the "order" which is too often exalted "at the cost of liberty." 274 U.S. at 375.

To suggest that such governmental activity is to be tolerated, no less sanctioned by this Court, in the absence of any probable cause for criminal prosecution is to fly in the face of every decision of this Court in recent years enforcing the mandate of the First Amendment. See for example: Brandenburg v. Ohio, supra; Elfbrandt v. Russell, 384 U.S. 11 (1966); Thornhill v. Alabama, 310 U.S. 88 (1940); United States v. Robel, supra; Thomas v. Collins, 323 U.S. 516 (1945); Herndon v. Lowry, 301 U.S. 242 (1937).

As this Court taught in Elfbrandt, standards controlling governmental action "touching . . . protected rights must be narrowly drawn to define . . . specific conduct as constituting a clear and present danger to a substantial interest to the State." 384 U.S. at 18. The standard the Executive seeks to sustain in this case as the justification for the governmental action which touches protected rights, 384 U.S. at 18, is neither "narrowly drawn" nor does it relate to any "clear and present danger to a serious substantive evil," Schenck v. United States, 249 U.S. 47. Quite to the contrary, the Executive candidly concedes that the governmental action is so far short of any "clear and present danger" that it does not even contemplate criminal prosecution arising out of the surveillance. Government Brief at 15-16. The "information" the Executive seeks through its warrantless wiretapping, relates, by its own statements, to activities which are so far removed from the "clear and present danger" criteria as to not even approach the outer boundaries of the criminal law.<sup>42</sup>

In its frantic efforts to evade the clear demands of the Fourth Amendment, prior approval by a "neutral and detached magistrate," Coolidge v. New Hampshire, supra, and the requirements of probable cause and particularity, Marcus v. Search Warrant, Berger v. New York, Katz v. United States, all supra, the Executive has advanced a position which would "wipe out" the First Amendment as well. New York Times v. United States, supra (concurring opinion of Justice Black).

We would suggest that no program of governmental activity that impinges upon the protected areas of the First Amendment has come before this Court for review in recent years which has so unashamedly and openly ignored the most elementary teachings of the Court in this most sensitive of areas of national life. We have pointed out earlier, see Point IA, supra, that the standard utilized by the Executive in this case to control the power exercised, "attempts" to "attack and subvert the existing structure of the government" (Affidavit of Attorney General) through its overly broad and vague formulations operates as a dragnet that inhibits "the exercise of individual freedoms protected by the Constitution." Baggett v. Bullitt, 377 U.S.

<sup>&</sup>lt;sup>42</sup>The Executive has formulated its surveillance program in the broadest terms to include mere suspicions and contingencies, not approaching the imminence requirement of *Bradenburg*, supra:

In fulfilling this responsibility [to protect the government against unlawful overthrow], the President must exercise an informed judgment. This in turn requires that all pertinent information be readily available to him. This is particularly important with respect to his obligation to protect the government from unlawful overthrow, since he cannot remain passive until there may be actual acts of insurrection or sabotage. Instead, the President must be able to collect in advance and on a continuing basis the information he needs to protect the government against destruction or such weakening as renders it impotent to function. Government's Brief at 15-16.

372 (opinion of Mr. Justice White). The words of the Court in. Aptheker v. Secretary of State, 378 U.S. 500 (1964) are particularly appropriate here: "Since this case involves a personal liberty protected by the Bill of Rights, we believe that the proper approach to legislation curtailing that liberty must be that adopted by this Court in NAACPW. Button, 371 U.S. 415 and Thornhill v. Alabama, 310 U.S. 88." This case like Aptheker "involves a personal liberty protected by the Bill of Rights," Cf. Boyd v. United States, Marcus v. Search Warrant, supra, and the words of Button are therefore "particularly appropriate here," 378 U.S. 516: "Precision of regulation must be the touchstone in an area closely touching our most precious freedoms." 371 U.S. at 438.

Freedom from arbitrary general searches is surely one of "our most precious freedoms," Cf. Boyd v. United States, supra. But the standard which the Executive seeks to utilize here to justify the invasion of this freedom is perhaps the most imprecise, overly broad and vague standard ever to reach this Court for review. Compare Baggett v. Bullitt, Cramp v. Board of Instruction; Keyishian v. New York; NAACP v. Button; Dombrowski v. Pfister, all supra. standard consisting of formulations this Court has time and again struck down as overly broad and vague in violation of the First Amendment. See for example, Baggett v. Bullitt, and Cramp v. Board of Instruction, supra. It is a standard which when used will "broadly stifle fundamental personal liberties," Shelton v. Tucker, supra. It is a standard which "lends itself to selective enforcement against unpopular causes," NAACP v. Button. It is a standard which in the words of this Court in Button "may easily become a weapon of oppression." And as the Court warned ominously in Keyishian it is a standard in which "uncertainty as to the scope makes it a highly efficient in terrorum mechanism," 385 U.S. at 601.

The requirement this Court has vigorously insisted upon for precision and strict and narrow formulation when governmental action touches the areas of the First Amendment reflect the same understanding which underlies the Court's insistence that when the things "to be seized" are words and ideas, the procedural requirements of the Fourth Amendment must be most strictly construed. As the Court pointed out in Stanford v. Texas at 485, "no less a standard could be faithful to First Amendment freedoms." See also Marcus v. Search Warrant, supra.

A program of warrantless wiretapping, of broad sweeping. general searches into the words and ideas of citizens, whenever the Attorney General in his sole discretion decides that a citizen or organization of citizens may be involved in activities which in his opinion "subvert the existing structure of the government" (Affidavit of Attorney General), is completely "violative of the commands of the Constitution." Robel v. United States, supra, at 266. As Mr. Justice Stewart wrote for the Court in Cramp, "the vice of unconstitutional vagueness is further aggrayated when, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." 368 U.S. at 287. We have pointed out earlier, Point IA, supra, the extraordinary relevance here of Mr. Justice White's question in Baggett v. Bullitt, supra as to the sweep of the operative words then before the Court for examination, "Where does fanciful possibility end and intended coverage begin?" 377 U.S. at 360. It is impossible to answer this decisive question in respect to the standard the Executive uses here to govern the operation of a system of wholesale domestic espionage and surveillance without concluding in Mr. Justice Stewart's words in Shuttlesworth v. Birmingham that:

Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of ... [government action] bears the hallmark of a police state. 382 U.S. 90, 91

In the words of Mr. Justice Marshall writing for the Court in Stanley v. Georgia, 394 U.S. 557, 565 (1969), "our whole constitutional heritage rebels" at the development in

this country of a system of internal espionage which caused England's eminent Constitutional historian one hundred years ago to write "the freedom of a country may be measured by its immunity from this baleful agency." May, Constitutional History of England, at 275 (1803).

The warrantless wiretapping of domestic political opponents engaged in by the Executive in this case and for which it seeks the sanction of this Court on a general scale, will not stop with the militant or radical Americans now the object of these latter day general searches. Like an infection it will spread throughout the entire society until no one will be safe, no one will be secure, no one will be able to raise his voice in public or in private without fear of being overheard by a police agent of the government who may at any time distort these words or ideas into "evil thoughts" Cf. Stanley v. Georgia, subject to prosecution and conviction. And then the "silence coerced by law" is achieved which Justice Brandeis warned against many years 274 U.S. 375. This, our modern history so sadly teaches us, is the inevitable prelude to the warning of Mr. Justice Jackson, of the ultimate conformity which can only finally result in the enforced silence of the graveyard, Barhette v. West Virginia, 319 U.S. 624 (1942). It is in this profound sense that the safety and the "security of the Republic," DeJonge v. Oregon, supra, depends upon the ability of this Court to meet its ultimate responsibility to rebuke any branch of the government which in the historic words of James Madison shall "overleap the great barrier which defends the rights of the people." Madison, Memorial and Remonstrance, supra.

This last Term this Court met such a challenge to the written Constitution and rejected the efforts of the Executive to claim an inherent power in the name of the "national interest" to set aside the commands of the First Amendment. The words of Mr. Justice Black in his last opinion for this Court are deeply appropriate here when once again the Executive claims a sweeping inherent power

in the name of the "national interest" to suspend the elementary liberties of the people this time to reintroduce into American life the arbitrary general searches and seizures directed against a political opposition which the Framers of the Constitution believed were banned forever from the new nation they were building. Justice Black's response to the Executive's extraordinary claim of power in New York Times last Spring was that to sustain the claim "would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make secure." And as the Justice wrote, in words which are dispositive here," the word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." New York Times Co. v. United States, 493 U.S. 713, 719 (1971) (concurring opinion of Mr. Justice Black).

II.

THE EXECUTIVE'S CLAIM OF POWER IS NOT AUTHORIZED, SANCTIONED OR RECOGNIZED BY TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 AND VIOLATES THE LETTER AND SPIRIT OF THE STATUTORY SCHEME CONSTRUCTED BY THE CONGRESS.

The government argues to this Court that in some way, Congress "has recognized the President's authority to authorize national security electronic surveillance without a warrant" (Government's Brief at 28) in the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. This astounding argument flies in the face of the clear meaning of the entire statutory scheme. Title III of the 1968 Act stands, quite to the contrary, as a clear monument to the intention of Congress to prohibit 'all electronic surveillance except in the narrowly defined circumstances of the statute, and to permit it then only in accordance with the strict procedures that the statute sets forth. The statute reflects a Congressional intent to protect Fourth Amendment rights singu-

larly absent from the analysis presented to this Court by the Executive in this case.

The Government's contention that Sec. 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 [1968], "recognized" warrantless national security electronic surveillance is entirely without merit. (Government's Brief at 28-29). Their position contradicts the plain meaning of the statute on its face and the manifest intent of Congress. Sec. 2511 provides generally that "interception and disclosure of wire and oral communications [shall be] prohibited."

This statute, enacted after this Court's constitutional decisions on the question of electronic surveillance in Katz and Berger, both supra, clearly rejects the truncated reading of the Communications Act of 1934, 47 U.S.C. § 605 [1934] advanced by the Executive after the Nardone decision, discussed above. Prior administrations, beginning with President Roosevelt advocated the legality of investigatory "interception" although the recognition by all prior administrations was universal that once the executive had determined to investigate by electronic surveillance in the area of national security, prosecution was foreclosed. 43

It is in this overall context of prohibition that the Government claims that the Congress authorized warrantless national security wiretapping. Sec. (3) of 28 U.S.C. § 2511 states that:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the president to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information

<sup>&</sup>lt;sup>43</sup>The 1968 Statute, 18 U.S.C. \$\$ 2510-20, prohibits both "interception" and "disclosure" *United States v. Schipani*, 289 F. Supp. 43 (E.D. N.Y. 1968); Compare with the discussion of past practices in Point I, supra.

deemed essential to the security of the United States. or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power. 18 U.S.C. § 2511(3).

Sec. 2511(3) cannot be considered in isolation from the rest of the statute. It is abundantly clear from an examination of Sec. 2511(3) in the broader context of all of Title III that, on the contrary, this section of the statute does not authorize warrantless national security wiretaps.

The statute does authorize, and carefully regulates, wire-tapping in specified areas. Sec. 2516 is an affirmative grant of power to the Attorney General with regard to wiretapping. Compare Sec. 2511(3), supra. It allows the Attorney General to obtain a prior judicial warrant to engage in electronic surveillance when there is probable cause that it "may provide or has provided evidence of:

- (a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);
- (b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restric-

tions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

- (c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);
- (d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;
- (e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;
- (f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or
- (g) any conspiracy to commit any of the foregoing offenses. 18 U.S.C. § 2516.

The crimes enumerated in Sec. 2516 (a) are "those offenses in the scheme of federal crimes which fall within the national security category." Sen. Rep. No. 1097, 90th Cong., 2d. Sess. 97 (1968). The Attorney General may use electronic surveillance protect the national security, therefore, when a prior judicial warrant has been obtained and the surveillance will provide evidence to prosecute any of these enumerated "national security crimes." No eavesdropping, even in the national security area, is authorized by this section without a warrant.

According to Sec. 2518(3), a warrant may issue only "if the judge determines that:

- (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
- (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
- (c) normal investigative procedures have been tried and have failed to reasonably appear to be unlikely to succeed if tried or to be too dangerous;
- (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person, 18 U.S.C. § 2518(3).

Broad investigative wiretaps not directly related to procuring evidence of criminal activity do not meet this requirement and warrants authorizing them are not permitted under this act. Warrants may only issue to gain evidence of any of the crimes enumerated in Sec. 2516, including the national security category. This standard for issuing a warrant demands a nexus between the purpose of the wiretap and specified criminal activity that poses a threat to the national security. It is wholly consistent with the language of Sec. 2511(3) which defines threats to the national security in terms of illegal activity: i.e., "overthrow of the Government by force or other unlawful means, against any or other clear and present danger to the structure or existence of the Government," (emphasis added). From this convergence of meaning (with Sec. 2511(3)), it is clear that Sec.

2516 is the basic statement of how the Executive may exercise his "constitutional power... to protect the United States" against threats to the national security—that is only by utilizing the warrant provisions of Sec. 2516 and the emergency provisions of Sec. 2518(7) discussed, infra. The unwillingness of the Executive to recognize and utilize the remedy of this statute in the national security area attests to the unreasonableness of the searches in this case and of its program of national security investigations generally. See App. A.44

The legislative history of Sec. 2516 is further compelling evidence that the Government's position that the act recognized warrantless national security surveillance is untenable. Senator Long had proposed an amendment to limit the issuance of court orders allowing wiretapping to instances concerning organized crime. This proposed amendment was rejected by the Senate in order to preserve the court order system of Sec. 2516 in the area of the enumerated crimes which include those concerning the national security. Senator McClellan, the sponsor of the bill, argued against the proposed amendment because it:

would end its (Title III) impact as a court system in the national security area. Under this amendment if you had information that someone was plotting to assassinate the President, you would

lize the warrant procedures, established by Congress in Sec. 2516 of the 1968 Act for national security investigations. Nathan Lewin, formerly deputy assistant attorney general in the Civil Rights Division of the Department of Justice, and assistant to the Solicitor General, writing in the November 20, 1971 issue of the New Republic stated:

The law specifically authorizes court ordered tapping or bugging in the investigation of a number of federal criminal offenses. Heading the list are violations of the Atomic Energy Act, and of the Espionage, sabotage and treason laws. Yet not a single court order has been sought by the Justice Department for an espionage, sabotage or subversion investigation. Lewin, N. "FACTS ABOUT WIRETAPPING: Lewis Powell's Confusion." The New Republic (November 20, 1971), p. 165

need to show, before you get an order that he is associated with organized crime. I do not understand an amendment designed to go that far. We are not requiring that. We are giving discretion to the President to act under the court order system in the national security area. 114 Cong. Rec. 14, 702 (emphasis added).

The Government would have us believe that to compel the Executive to abide by the strictures of the Fourth Amendment would frustrate its efforts to protect the country from "bombings" and similar threats to our national security. (Government's Brief at 18, n. 7). This argument ignores the specific remedy provided by the Congress in the area of national security.

Congress has already considered which activities threaten the well-being of the society and made them crimes. Congress has also already determined which crimes are sufficiently serious to allow for the extraordinary invasion of privacy presented by wiretapping, and has provided for electronic surveillance authorized by warrant in fighting these crimes, which include the "national security crimes" enumerated in Sec. 2516. There are, of course, many lesser crimes for which no warrant proceeding authorizing electronic surveillance was contemplated because Congress obviously felt that those lesser crimes were not so serious as to justify the use of electronic surveillance, even by prior warrant.

Warrantless national security surveillance as advocated here by the Government would frustrate the Congressional purpose of limiting such surveillance to the specified crimes.

The Congress has already indicated its flexibility in responding to the changing character of national security. threats by amending the list of crimes contained in Sec. 2516(1)(a) for which the warrant procedure may be utilized by the Executive. See e.g. 18 U.S.C. § 844 et. seq. which has been added to Sec. 2516 by Pub. L. No. 91-452 (July 29, 1970), a statute involving possession and use of

explosives. Compare p. 18, n. 7 of the Government's Brief. In the instant case, the crimes for which defendants were indicted would not support a warrant authorized by Sec. 2516. However, if the Executive had determined that investigation with the technique of electronic surveillance had been necessary, a warrant proceeding for investigation of other relevant crimes listed in 2516(1)(a) may have been appropriate. Furthermore, evidence of the crimes charged in the indictment gained by electronic surveillance as authorized by such a legal warrant would be admissible. See Sec. 2517(5). Sec. 2518(7) also authorizes a post validation of an otherwise lawful search.

What the Executive cannot do under this legislative scheme is search without a warrant under the vague and overly broad rubric of protecting the nation from so-called subversive elements as occurred in this case. See Affidavit of Attorney General (App. at 21-23, Paragraph 3). The Executive's claim that the Congress "recognized this vague and overly broad power by enacting Sec. 2511(3) ignores the clear meaning of the statute which prohibits general searches and attempts to authorize only those incursions on the rights of privacy which are within the strictures of the Fourth Amendment.

That Sec. 2511(3) does not authorize warrantless domestic security electronic surveillance is further supported by reference to another Section of Title III, 2518(7). This section containes the emergency provisions of the act whereby eavesdropping may be legally accomplished without a prior judicial warrant if a warrant is thereafter applied for within 48 hours. The exception applies only when:

<sup>&#</sup>x27;(a) an emergency situation exists with respect to conspiritorial activities characteristic of organized crime and threats to the national security, and

<sup>(</sup>b) there are grounds upon which an order could be entered under this chapter to authorize the interception." 18 U.S.C. § 2518(7).

Congress determined exactly in what manner "national security" crime investigations should be specially handled. The special treatment prescribed by Congress is no more or less than to permit wiretapping, otherwise limited by the act, in emergency situations without a prior judicial warrant, only "if an application for an order approving the interception is made ... within 48 hours after the interception has occurred, or begins to occur." Sec. 2518(7). The standards for the post-search judicial determination of whether the surveillance was valid and therefore should be allowed, by warrant, to continue, or if completed, be validated, are the same standards as those set out in Sec. 2518(3) for the enumerated crimes of Sec. 2516.

The legislative history surrounding the enactment of Title III makes it unmistakably clear that this is the only exceptional treatment authorized by Congress with respect to wiretapping in the "national security" area. 114 Cong. Rec. 16,296. Title, III was enacted along with the rest of the Omnibus Crime Control and Safe Streets Act of 1968 by the House after little discussion. Title III had originated in the Senate. The House, which finally passed the bill, immediately after Senator Robert Kennedy's untimely death clearly had the court order system in mind for dealing with "national security" problems. The only comment on this question came from two Congressmen. Representative Pollack carefully noted:

Only in the case of national security can wiretaps be made without court order. And even these are invalid if application for such order is not made within 48 hours after such surveillance is undertaken. 114 Cong. Rec. 16,296 (emphasis added) 46

<sup>&</sup>lt;sup>45</sup>Respondents take no position on the constitutionality of this and the other sections of Sec. 2510 et. seq. since they are not actually before the Court in this case for purposes of constitutional scrutiny.

<sup>&</sup>lt;sup>46</sup>The only other Congressman to state any views before the House on warrantless wiretappings was Rep. Randall whose expressed view was almost identical with that of Rep. Pollack. See 114 Cong. Rec. 16,298.

The completeness and precision with which Sec. 2516 and Sec. 2518 establish the standards and procedure for national security wiretapping in both the ordinary and emergency situation indicate that this is the only way Congress intended to deal with the issue and further, that other methods of dealing with it are prohibited.

The Government's position that the statute authorizes warrantless surveillance is also incompatible with Sec. 2520, of Title II, which provides for the recovery of civil damages when, "Wire or oral communication is intercepted in violation of this chapter." "Good faith reliance on a court order or on the provisions of Section 2518(7)" are defenses to such a suit. No defense for "national security" wiretapping is set forth. The failure to include "national security" surveillance in the list of defenses necessarily implies that, in fact, there is no "national security" exception to the warrant requirements of Secs. 2516 and 2518.

Sec. 2511(3), on its face, also contradicts the Government's contention that this section "recognizes" warrantless national security electronic surveillance. A few lower courts have recently read in a "foreign security" exception to the blanket prohibitions against wiretapping in Sec. 605 of the Communications Act of 1934. 47 U.S.C. § 605 [1934]. The Government contends that Sec. 2511(3) embodies a congressional acceptance of a foreign security exception and authorizes the executive to engage in warrantless wiretaps in foreign affairs cases. Respondents have argued elsewhere on this point. See Point I, B(4) supra at p. 98. Assuming, however, that Sec. 2511(3) did recognize this executive power, the statute does not carve out a corresponding domestic exception to Sec. 605 to permit Executive electronic surveillance without a warrant in the domestic security area.

There is a crucial difference in the language of 2511(3) with regard to foreign and domestic situations. In the for-

<sup>&</sup>lt;sup>47</sup>See Point I, B(4), supra, at p. 100. This exception to Sec. 605 has been advocated by the present administration although never asserted in judicial proceedings by its predecessors.

eign area the statute says, "Nothing contained in this chapter or in Sec. 605 of the Communications Act of 1934 shall limit the Constitutional power of the President . . ." (emphasis added). Concerning domestic threats, however, the provision is much narrower, "Nor shall anything contained in this chapter be deemed to limit the Constitutional power of the President . . ." This failure to mention Sec. 605 is significant. Sec. 605 provides that, "no person not being authorized by the sender shall intercept and divulge . . . any communication." This prohibition includes Federal officials as well as others. Nardone, supra. By explicitly exempting. the foreign, but not the domestic area from the blanket prohibition of Sec. 605, Congress has clearly indicated a distinction between the foreign and domestic situations and an unwillingness to recognize the power of the Executive in the domestic area. Congress, in short, has refused to adopt a statutory exception to the blanket prohibition of Sec. 605 in the domestic area.

Other courts that have considered the meaning of Title III with regard to the Government's claims have identified additional compelling arguments which reject the proposition that Title III "recognizes" the alleged powers of the President to eavesdrop on domestic organizations without a prior warrant. These interpretations are in accord with the clear meaning of the total legislative scheme of Title III which sets forth with precision the availability of electronic surveillance in what Congress defined as national security crimes.

Judge Ferguson, in *United States v. Smith*, 321 F.Supp. 424 (C.D. Cal. 1971), treated the language of Sec. 2511(3)' as simply an exception to the *punitive sanctions* of the act. Section 2511(3) is one of the specific provisions of Section 2511 which makes it a crime to intercept communications unlawfully. Sec. 2511(3), therefore, contains an exception to the criminal provisions of Sec. 2511(1) in the same manner as Sec. 2511(2) exempts another class of persons. Judge Ferguson found this argument as to the meaning of Sec. 2511(3) to foreclose the Government's claim that this section "recognized" the Executive's power to conduct general investigatory searches as claimed in this case.

The major thrust of ... [Sec. 2511] makes electronic eavesdropping a federal crime punishable by a fine of \$10,000 or imprisonment of up to five years, or both ... [Sec. 2511(3)] provides for one of those exceptions. Thus, the President does not commit a crime under the statute when he authorizes electronic surveillance "to obtain foreign intelligence information," similarly, it provides that the President is exempt by the criminal sanctions of the Act when he takes, "such measures as he deems necessary to protect the United States against overthrow of the government by force or other unlawful means."

Regardless of these exceptions in the criminal statute, the President, is of course, still subject to the constitutional limitations imposed upon him by the Fourth Amendment. Congress expressly recognized this when it stated (in Sec. 2511(3)) that evidence resulting from such an electronic surveillance could "be received in evidence ... only where such interception was reasonable ..." United States v. Smith, supra at 425-426.

Thus, the President may be immune from the criminal sanctions under this provision, but the Fourth Amendment's exclusionary rule and the protections of the rest of Title III are not eliminated. The test of reasonableness remains that which the Fourth Amendment has historically required; and we have argued in points IA and IB, *supra*, that a prior warrant authorizing such a search is constitutionally mandated.

The Court of Appeals for the Sixth Circuit, in this case, in considering the language of Sec. 2511(3) also rejected the Executive's claim that the statute "recognized" the inherent powers of the President to utilize such surveillance against domestic groups for purposes of investigation to protect the national security. The lower court recognized that the Executive advocated this power, but held that Congress did not grant it in enacting Sec. 2511(3) of Title III:

The language chosen by Congress . . . is not the language used for a grant of power. On the contrary, it was . . . clearly designed to place Congress in a completely neutral position in the very controversy with which this case is concerned. *United States v. United States District Court*, (App. at 57).

The Court of Appeals pointed out that Section 2511(3) merely recognizes the existence of the claim and authorizes only that nothing shall limit the "constitutional" power of the President. The extent of that Constitutional power is left by Congress to this Court and to the Constitution.

The Congressional debate on Sec. 2511(3) supports the reading of this section by the Sixth Circuit. Senator Holland, one of the strong supporters of this provision responded to Senator Hart's fears concerning the potential application of the section:

Mr. President. I think that the distinguished Senator is unduly concerned about the matter... We are simply saying that nothing herein shall limit such power as the President has under the Constitution. If he does not have the power to do any specific thing, we need not be concerned. We certainly do not grant him a thing. 114 Cong. Rec. 14,751.

## To which Mr. Hart replied:

As a result of this exchange, I am now sure that just because some political group in this country is giving him fits, he could not read this as an agreement from us that by his own motion, he could put a tap on. 114 Cong. Rec. 14,751.

It is therefore apparent on the face of Title III that Congress provided a specific mechanism for the Executive Branch to follow in utilizing electronic surveillance in national security situations. The legislative scheme is designed to be consistent with the Fourth Amendment's imposing protections as guaranteed by this Court. The Congress specified the crimes for which such national security surveillance can be properly conducted, established the procedure for obtaining a prior warrant and set forth the limited emer-

reasonable can be post-validated and continued with a warrant if necessary. Sections 2511(3) and 2515 require that. In a judicial proceeding, such surveillance materials to be admissible, must comply with the constitutional requirements of the Fourth Amendment and the legislative scheme of Title III, designed to protect these guarantees.

It is abundantly clear that the specific language of Sec. 2511(3), relied upon by the government as Congressional recognition of the power it claims in this case, does not in any way support its position of engaging in warrantless Executive searches without a showing of probable cause and without adherence to the Fourth Amendment concept of particularity. To hold otherwise would do a grave injustice to the scheme set forth by the Congress in Title III.

The Congress did not consider Title III without benefit of specific decisions by this Court concerning electronic surveillance. The legislative history is replete with references to the Court's decisions in Berger and Katz, both, supra. And the Congress clearly knew of Mr. Justice White's admonition in his dissent in Berger, supra, that the desires of the Executive for broad legislatively authorized powers would not foreclose constitutional inquiry by this Court. The words of Title III, and in particular Section 2511(3) must be read consistent with the highest duty of this Court to interpret the actions of the legislature by the standard set in the Constitution. As the Court taught in Marbury:

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, not such ordinary act, must govern the case to which they both apply. 1 Cranch. 135, 178 (1803)

See also Powell v. McCormack, 395 U.S. 486 (1969).

The protections of Title III of the rights of citizens lie in the particular efforts of the Congress to authorize specific surveillances for specific crimes effecting the national security and not in the vague and general language of Sec.

2511(3) which the Executive has read in isolation and without regard to the clear meaning of the remainder of the Act. In an area of governmental activity which touches the very quick of First Amendment rights as does a search for words, thoughts, and ideas, Cf. Marcus v. Search Warrant, and Stanford v. Texas, both supra, absolute precision of regulation must be the test of constitutionality. See NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama, 377 U.S. 208 (1963); Cantwell v. Connecticut, 310 U.S. 296 ((1939); Aptheker v. United States, 378 U.S. 500 (1963); and United States v. Robel, 389 U.S. 258 (1967). To allow vague references to the shopworn "talisman of national security." Robei, supra, to control the business of measuring statutes against the Constitution would be to do away with constitutional freedoms themselves. The words of Aptheker, supra, should serve to remind us of this danger:

The Government emphasizes that the legislation in question flows, as the statute itself declares, from the congressional desire to protect our national security. That Congress under the Constitution has power to safeguard our Nation's Security is obvious and unarguable. Cf. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159-160. As we said in Mendoza-Martinez, while the Constitution protects against invasions of individual rights, it is not a suicide pact. Id. at 160. At the same time the Constitution requires that the powers of government 'must be so exercised as not, in attaining a permissible end unduly to infringe a constitutionally protected freedom.' Cantwell v. Connecticut, supra at 304. Aptheker, supra at 509.

To distort the broad vague wording of Sec. 2511(3) into the grant of power the Executive here seeks would be to ignore the most elementary teachings of this Court that legislation which touches fundamental rights must be drawn narrowly and precisely. Shelton v. Tucker, 364 U.S. 479 (1960); Near v. Minnesota, 283 U.S. 697 (1931); NAACP v. Button, 371 U.S. 415 (1960). In 1968, the year of the passage of the Act in question here, the then Attorney Gen-

eral had the occasion to remind the Congress in an analagous field of legislation that "federal legislation, if enacted, should be precisely drafted, with a clear definition of all operative terms, so as to preserve scrupulously the constitutional rights of all Americans."48 To even suggest that the broad vague words of Sec. 2511(3) were "precisely drafted" enough to be considered a statutory grant of power is absurd on its face. If it were so read it would fall as unconstitutionally vague and indefinite under the most elementary principles of constitutional adjudication enunciated by this Court. Cf. Shuttlesworth v. Birmingham, 382 U.S. 871 (1963) (opinion of Mr. Justice Stewart); Baggett v. Bullit, 377 U.S. 360 (1964) (opinion of Mr. Justice White); NAACP v. Button, 371 U.S. 415 (1968) (opinion by Mr. Justice Brennan). However, here, unlike Robel and Aptheker, supra, the Court is able to read the statute, consistent with its plain words and underlying intent, so as to safeguard the "superior" impact of the Constitution. Marbury v. Madison, supra.

Title III must be read as consistent with the Fourth Amendment, not in derogation of it. The Executive's effort in reading the language of Sec. 2511(3) as recognition of "the President's authority to authorize national security surveillance without a warrant" (Government's Brief at 28) must be rejected as wholly violative of both the intent of Congress and the commands of the Fourth Amendment.



<sup>48114</sup> Cong. Rec. March 5, 1968, p. 5213.

THIS COURT SHOULD NOT RECONSIDER, AS THE GOVERNMENT SUGGESTS, ITS CONSTITUTIONAL HOLDING IN ALDERMAN V. UNITED STATES THAT CONVERSATIONS OVERHEARD BY ILLEGAL ELECTRONIC SURVEILLANCE TO WHICH DEFENDANTS HAVE STANDING TO OBJECT MUST BE DISCLOSED FOR THE PURPOSE OF AN ADVERSARY HEARING ON RELEVANCE.

1) The Government argues a fall-back position to this Court in the event that its claims of legality for warrantless domestic security surveillance are rejected. It urges the Court to "reconsider" its decision only two years ago in Alderman v. United States, 394 U.S. 165 (1969). Its suggestion, simply stated, is that the courts should be permitted to determine in camera whether the conversations overheard by the illegal electronic surveillance are arguably relevant to a prosecution before disclosure to the defendant is required. Government's Brief, pp. 35-36. The Government concedes that Alderman has already determined this issue adversely to its claims but argues that "reconsideration" of Alderman "is appropriate... for a number of reasons." Id. at 36.

The Government concedes that Alderman, supra, requires disclosure by the Government to the defense in a criminal case where the surveillance was unlawful. The Court contemplates that, even in some so-called "national security" cases, the Government will be required to disclose or dismiss the indictment. Id. at 181, 184.

In advocating a reconsideration of Alderman's absolute requirement of disclosure whenever the surveillance in issue has been determined to be illegal, the Government has offered an analysis of the Alderman rationale which characterizes the opinion of Mr. Justice White as an exercise of the Court's supervisory power. Government's Brief at 37.

We believe that Alderman embodies an important Constitutional principal of notice to a litigant of materials unlawfully seized by the Government's wrongs as guaranteed

by the Fifth Amendment to the Constitution of the United States. Alderman v. United States, supra, and Coplon v. United States, 185 F.2d 629 (2nd Cir. 1951). Further, in the context of the unique problems of searches by the stealth of unlawful electronic surveillance, such full disclosure is the only way the Fourth Amendment exclusionary rule of this Court, Weeks v. United States, 232 U.S. 383 (1914), can be implemented since in the area of electronic surveillance, unlike other forms of searches, the defendant is at the mercy of the Government for the details of the illegal enterprise which the Government has perpetrated against him. The Court's decision in Alderman v. United States, supra, which announces a constitutional holding, requires full disclosure to a defendant of the logs of the illegal overhearing of his conversations.

The decision in Alderman is premised on the recognition by the Court that the use, by the Government, of unlawfully seized evidence in a criminal trial is contrary to the Fourth Amendment, is expressly proscribed by statute, 49 and is inimical to the public policy they seek to preserve:

In a government of laws existent of the government will be imperiled if it fails to observe the law scrupulously. To declare that in the administration of the criminal law the end justifies the means-to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that

<sup>&</sup>lt;sup>49</sup>Sec. 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

This section of the 1968 Act was before the Court when it decided Alderman, supra. Id. at 175-176.

pernicious doctrine this Court should resolutely set its face. Olmstead v. United States, 277 U.S. 438, 485°(1928) (Brandeis, J., dissenting).

. In order to uphold the "imperative of judicial integrity," Elkins v. United States, 364 U.S. 206, 222 (1960), which Mr. Justice Brandeis alluded to in his dissenting opinion. this Court in Weeks v. United States, 232 U.S. 383 (1914), fashioned the "exclusionary rule" prohibiting the introduction of evidence in a Federal criminal prosecution that had been seized in violation of the Fourth Amendment. See also McNabb v. United States, 318 U.S. 332 (1943). The "exclusionary rule" was applied to state prosecutions in Mann v. Ohio. 367 U.S. 643 (1961): The functional basis of the rule which is derived from the Fourth Amendment. is three-fold: (1) "to deter-to compel respect for the constitutional guaranty in the only effectively available wayby removing the incentive to disregard it," Elkins v. United States, supra at 217; (2) to provide a means by which an "aggrieved party" may vindicate constitutionally guaranteed rights which have been violated, see Jones v. United States, 362 U.S. 257 (1960); Marcusi v. Deforte, 392 U.S. 364 (1968); Simmons v. United States, 390 U.S. 377 (1968); (3) to protect the integrity of the judiciary. See Olmstead v. United States, supra; Elkins v. United States, supra. Cf. 18 U.S.C. Sec. 2515.

Not only is the Government prohibited by the exclusionary rule from using evidence it has acquired directly and illegally, e.g., Mapp v. Ohio, supra, and Katz v. United States, 389 U.S. 347 (1967), but it is forbidden to use evidence which is derivative of an illegal search and seizure, i.e., "Fruit of the poisonous tree." See Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1921); Wong Sun v. United States, 371 U.S. 471 (1963).

The Fourth Amendment also protects the individual against the "uninvited ear." Oral statements which are illegally overheard, and their fruits, are therefore subject to exclusion from a criminal proceeding under the rule expressed in Weeks v. United States, supra. In Silverman v.

United States, 365 U.S. 505 (1961), this Court recognized the right of citizens to be secure from eavesdroppers in one's own home. Wong Sun v. United States, supra, applied the "fruit of the poisonous tree" doctrine to oral statements made by the defendant to the police during the course of an illegal search of the defendant's home. Finally, Katz v. United States, 389 U.S. 347 (1967), recognized the principle that the Fourth Amendment protects an individual's private conversations as well as his premises from illegal searches and seizures. The Congress has legislated the imposing protections of the Fourth Amendment and its exclusionary rule into the statutes of the United States. See 18 U.S.C. Secs. 2510 et seq. and 3504.50

In the area of electronic surveillance, unlike other forms. of searches and seizures, there is no notice of the occurrence of the search to the subject. To combat the lack of notice of electronic surveillance, this Court fashioned in Alderman v. United States, 394 U.S. 165 (1969), a procedural mechanism of constitutional dimension to effectuate the ruling of the Court in Nardone v. United States, 308, U.S. 338, 341 (1939), that the "trial judge must give opportunity . . . to the accused to prove that a . . . portion of the case against him" is the result of an illegal search and seizure. See also Coplon v. United States, 185 F.2d 629 (2nd Cir., 1951). The Coplon case, decided twenty years ago, recognized the constitutional nature of the requirement of disclosure of illegal surveillance logs to the defendant. Judge Learned Hand stated this proposition in the clearest of terms:

was, as we have said, a denial of their constitutional right, and we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf. In the case

<sup>50</sup> Compare Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), Chief Justice Burger dissenting.

at bar it may seem to have been a flimsy grievance to deny to Judith Coplon the opportunity o argue that these records did "lead," or might have "led," to her conviction; in truth it is extremely unlikely that she suffered the slightest handicap from the judge's refusal. But we cannot dispense with constitutional privileges because in a specific instance they may not in fact serve to protect any valid interest of their possessor. Back of this particular privilege lies a long chapter in the history of Anglo-American institutions. Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the. accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism. Coplon, supra at 638.

In Alderman, supra, this Court ordered the Government to disclose to the accused and his counsel all illegally acquired wiretaps to which the defendant has standing to object. The Court rejected the Government's position, which it has sought to reargue here, that when dicslosure of an illegal wiretap poses a "potential danger to the reputation or safety of a third party or to the national security," the determination as to whether the records sought were in fact "arguably relevant" should be made by the trial judge in an in camera proceeding. This Court held that the exclusionary rule could only be effectively implemented by an adversary proceeding. Id. at 181.

In the present case before the Court the petitioner argues, contrary to the clear constitutional holding in Alderman, that the trial judge should make an initial in camera determination of "arguable relevancy" of the illegal electronic surveillance because the Attorney General has determined that disclosure of the logs "would prejudice the national interest." Affidavit of the Attorney General, App. 20. In Alderman the Court reaffirmed its holding in Jencks v. United States, 353 U.S. 657, 670 (1957) that "it is unconscionable to allow . . . (the Government) to undertake[n] prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense." In Jencks, as in Alderman, the fact that the illegal search related to national security was irrelevant. See also United States v. Coplon, supra.

Justice Fortas, in writing the majority opinion in *Dennis* v. *United States*, 384 U.S. 855 (1966) which required the Government to turn over the minutes of grand jury testimony which resulted in the indictment of the defendants, stated:

In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a store house of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations . . . such as [cases] involving the Nation's security . . . At 873-875.

Justice Fortas in a separate opinion in Alderman, supra at 209, dissented from the majority's order to the Government to disclose to defendants Ivanov and Butenko, who were convicted of conspiring to transmit to the Soviet Union information relating to the national defense of the United States. He defined his usage in Dennis of the term "nation's security":

I mean to refer to a rigid and limited category. It would not include material relating to any activities except those specifically directed to acts of sabotage, espionage, or aggression by or on behalf of foreign states. (emphasis added) Id. at 209.

Thus even Justice Fortas' restrictive definition of national security would not foreclose disclosure to the defendant in the present case, since the purpose of the surveillance in this case was to investigate a domestic organization. See Point I.B.4 supra. The Government has the choice of either obeying the Constitutional holdings of this Court and disclosing the evidence it has illegally seized or in the alternative dropping the prosecution. See Dennis v. United States, supra; Jencks v. United States, supra; United States v. Andolschek, 142 F.2d 502 (2nd Cir., 1944); United States v. Coplon, supra; Alderman v. United States, supra.

In order to insure against the possibility that illegally seized evidence may find its way into a criminal proceeding, in violation of the Fourth Amendment, this Court in Alderman ordered an adversary proceeding. Directing itself to the necessity for adversary proceedings, where illegal electronic surveillance had occurred, the Court said:

[Adversary proceedings] will substantially reduce [the] incidence [of error] by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands. *Id.* at 184.

As early as 1966 this Court in *Dennis v. United States*, supra, recognized that in camera procedures were not sufficient where the record was too complex, thus necessitating adversary proceedings:

In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production and to supervise the process . . . Dennis v. United States, supra, at 875.

An essential component of our system of justice is the adversary proceeding. The adversary method has proven

itself to be a superior means for attaining justice; the demonstrated superiority of the adversary system is especially clear in situations, as in the case before the Court, "... where an issue must be decided on the basis of a large volume of factual material." Alderman, supra at 183-184.51

The Court in Alderman fashioned a procedural mechanism of constitutional dimensions consisting of (1) disclosure to the injured defendant of all illegal electronic surveillance records, and (2) an adversary proceeding so that the accused will be insured of an opportunity "... to prove that a substantial portion of the case against him was the product of unlawful surveillance." Conversely, such a proceeding provides an "opportunity to the Government to convince the trial court that its proof had an independent origin." Aldermany supra at 183. The mechanism established in Alderman represents the application, by the Court, of the Fourth Amendment exclusionary rule to the rapidly increasing number of cases involving illegal electronic surveillance. As the Court states, "... cases involving electronic surveillance will probably differ markedly from those situations in the criminal law where in camera procedures have been found acceptable." Id. at 182, n.14.

Alderman, as an application of the exclusionary rule in the area of electronic surveillance, is a constitutional mandate and not merely an exercise of the Court's supervisory powers. The past holdings of this Court lend themselves

<sup>51</sup> See the Transcript in United States v. Gray (N.D. Cal.), No. 69-141, May 4, 1971. The trial Judge spoke on the necessity of an adversary proceeding: "... having looked at the material [logs of the illegal electronic surveillance] ... the volume is very great ... And as Alderman points out, the Court, without having the background of this material and knowing thoroughly what is involved, is not one who could readily recognize whether or not material is arguably relevant ... [it] is just a burden that should not be imposed upon the court, and it requires an expertise or a sophistication or a background that this court does not have. And also, how do I know whether any such material might be valuable for impeachment purposes?" See also, Opinion of the Sixth Circuit, App. 66.

to only one interpretation of the Fourth Amendment exclusionary rule; it is of constitutional origin.

Without the exclusionary rule, which acts as assurance against unreasonable searches and seizures, the Fourth Amendment "would be just a form of words, valueless in terms of human liberties," Mapp v. Ohio, supra at 655. In Weeks v. United States, supra, the exclusionary rule was formulated as a constitutional principle, representing a means of effecting the Constitutional guarantee:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confession... should find no sanction in the judgments of the courts, wheih are charged at all times with the support of the Constitution... (emphasis added) 232 U.S. at 392.

If our courts acted differently, and allowed the admission, in a trial, of illegally seized evidence, it would represent "a disregard [by our courts] of the liberty deemed fundamental by the Constitution . . ." McNabb v. United States, supra at 340.

2) In support of its extraordinary request for a reconsideration of this Court's decision of two years ago in Alderman, the Government suggests that the 1968 Act, 18 U.S.C. Sec. 2518(8)(d) and (10) (a) in particular, has "superseded by legislation," Government's Brief at 37, this Court's decision in Alderman concerning the requirement of disclosure of illegal interceptions to a criminal defendant with standing to object. Apart from the doubtful logic of suggesting that Congress could ever overturn a constitutional holding of this Court, cf. Powell v. McCormack, supra, the suggestion is incredible in light of the fact that Alderman followed by a year the enactment of the 1968 Act.

The Executive has attempted to turn on its head the clear meaning of the 1968 Act by asserting that since the *Alderman* decision "reflects an exercise of the supervisory power" of the Court and because "Congress in the Omni-

bous Crime Control and Safe Street Act of 1968, 18 U.S.C. 2518(8)(d) and (10) (a) has taken a more flexible approach to disclosure than *Alderman*, that decision may well be superseded by legislation with respect to post-1968 surveillance." Government's Brief at 37.

A more topsy-turvy argument has never graced the pages of a brief to this Court. In the first place, we are told that the surveillance in this case occurred after June 19, 1968, Government's Brief at 42, the effective date of this Act, so if any statutory provisions control this issue it is the terms of the 1968 Act. In fact, Alderman v. United States; 394 U.S. 165, 175-176 was decided March 10, 1969, almost one year after the effective date (June 19, 1968) of the 1968 Act. It is therefore a complete mystery to us how legislation enacted before the decision by this Court in Alderman can be grounds for arguing that Alderman was "superseded by legislation [the 1968 Act] with respect to post-1968 surveillance." Government's Brief at 37.

If there be any question that this answer to the Executive's argument challenges the credulity of the Government beyond tolerable limits, we refer the Court to the decision of Mr. Justice White in Alderman, supra at p. 175, n. 8 and n. 9, which describes the 1968 Act at some length and observes that the exclusionary rule fashioned by this Court is preserved and codified by its terms. See Sec. 2518(10)(a).

Unfortunately, the Government was not content to leave its argument from the statutes at this juncture. We are next told that the provisions of the 1970 Act, 18 U.S.C. 3504(b), which limit disclosure in pre-June 1968 surveillances to those which "are relevant to a pending claim of inadmissibility," reflect "the view of Congress that Alderman imposes a rule that is too inflexible." Government's Brief at 37.

<sup>&</sup>lt;sup>52</sup>We shall argue below that the terms of Title VII of the Organized Crime Control Act of 1970, 84 Stat. 935, 18 U.S.C. 3504 are irrelevant to this case because this statute by its terms concerns pre-1968 unlawful surveillance, clearly not in issue.

Whatever Congress may have had in mind for the Jencks Act Amendments concerning pre-1968 surveillance, their relevance to surveillance designated as post-June 1968 by the Government and thereby specifically exempted from the terms of the 1970 Act, Sec. 3504(b), escapes us.

There is one other failing in the Government's reference to the legislative history of both the 1968 and 1970 Acts. The Government has strenuously argued elsewhere in its brief (Government's Brief at 28) that the provisions of 18 U.S.C. 2510 et seq. do not apply where national security surveillance is concerned because:

In 18 U.S.C. 2511(3), discussed supra, Congress excepted national security surveillance from the reach of the 1968 Act because it intended the government to be able to operate in that area without the stringent limitations that the Act imposed. Government's Brief at 41.

We have demonstrated at some length elsewhere (Point II, supra) that, to the contrary, the 1968 Act sets forth a procedure for the Executive to follow in engaging in all forms of electronic surveillance, including searches to preserve the "national security" from the enumerated criminal activities that Congress has determined constitute a sufficiently serious threat to the nation to warrant the intrusion into the protected rights of privacy that such electronic surveillance necessarily entails. But the inconsistency at this juncture of the Executive's argument to this Court is that reference to the legislative history of the 1968 Act, if it is germane to the Court's consideration of the impact of its Alderman decision on so-called national security electronic surveillance at all (Alderman post-dates the 1968 Act rather than precedes it), would imply a recognition that the 1968 Act applies to the kind of surveillance in issue. Of course, logic will not permit the Government simultaneosuly to concede that the 1968 Act applies here but to deny that the Government is bound by the warrant provisions provided there for national security surveillance. Therefore, the Executive is left with the weakest of conclusions as to the impact of the Congressional deliberations:

In light of the provisions and history of the 1968 and 1970 Acts, we submit that the automatic disclosure dictated by Alderman should be considered superseded by congressional enactment even in respect to ordinary criminal cases. A fortiori it was Congress' intent that automatic disclosure not be required in the narrow circumstances of national security cases which it has exempted from the coverage of the 1968 Act. Government's Brief at 46-47.

In the best of circumstances, references to legislative history can only aid this Court in examining the clear meaning of a statute on its face. Cf. Aptheker v. United States, 378 U.S. 500 (1963). Reference to the history of a statute that by the Government's own arguments does not apply in the circumstances in this case, compounded by the Government's gross misstatement that the statute and its history supersede the decision in Alderman when in fact the statute precedes it by almost one year, leaves this Court with obfuscation rather than clarity. In these circumstances it would be useful to examine the relevant portions of the 1968 Act on their face.

The portions of the 1968 Act upon which the Executive relies provide:

The judge, upon the filing of a motion, [following an inventory of a surveillance authorized by the chapter] may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications. . . as the judge determines to be in the interest of justice. 18 U.S.C. 2518(8)(d)

Such motion [a motion to suppress] shall be made before trial, . . . The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interest of justice. 18 U.S.C. 2518(10)(a).

The Executive has read these two portions of the 1968 Act to mean that the statute "does not adopt an automatic disclosure rule, but gives the judge discretion to determine if disclosure is in the interests of justice." Government's Brief at 41. To support this reading of the statute, the Executive refers to the Committee Report of the Senate. which reported out the bill. These two provisions, quoted above, were adopted as proposed. Senator McClellan spoke for the Committee on the Judiciary on the proposed sections in issue here. The Government has quoted one portion of Senator McClellan's remarks on the meaning of these sections. Government's Brief at 42, n.19. Those remarks merely state that the defendant cannot turn a motion to suppress into a "bill of discovery . . . in order that he might learn everything in the confidential files of the law enforcement agency." The sections also should not be read, the Senator said, as allowing that the privacy of other people will be "unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications." Id. Even if nothing more had been said on the meaning of these sections of the 1968 Act, it would be clear that nothing in the provisions implied that a defendant in a criminal case, who had standing to object to the illegal overhearing of his own voice, ought not have those materials concerning him only.

Indeed, disclosure to a defendant in fact was contemplated. In commenting on the parallel language of Section 2518 (8)(d), Senator McClellan notes: "Through its operation all authorized interceptions must eventually become known at least to the subject." Sen. Rep. No. 1097, 90th Cong., 2d Sess. 105 (1968). All that is at issue in this case is the question of the requirement of turning over the conversations of the defendants themselves, if this Court should determine that the interceptions were illegal. For purposes of its argument to the Court on the vitality of the Alderman disclosure requirement, the Executive has postulated that the surveillance is illegal. Government's Brief at 35-36.

The provisions of the statute referred to by the Government therefore controvert its argument because the language "interest of justice" in both sections has been construed to require at a minimum disclosure "at least to the subject." Sen. Rep., supra at 105. And the inventory disclosure requirement of 2518(8)(d) applies to surveillance whether it be legal or illegal. A fortiori, illegal surveillance must certainly be disclosed.

In a transparent effort to buttress the weakness of arguing from legislative history of a Bill enacted before Alderman v. United States, supra on the proposition that the pre-Alderman legislation supersedes the Alderman holding, the Government next turns to provisions of the 1970 Act. That Act, by its terms, concerns surveillance that occurred prior to the effective date of the 1968 Act, June 19, 1968:

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such-inadmissibility; 18 U.S.C. 3504(2).

The Act, by its terms, does not concern the surveillance in this case which occurred after the effective date of the 1968 Act. But, perhaps more importantly, the very comments of Senator McClellan that the Executive has quoted (Government's Brief at 46, quoting Senator McClellan in 116 Cong. Rec. S.1775) refer to the legislative history of the 1968 Bill relied upon by the Executive to show that Sections 2518(8)(d) and (10)(a) do not require full disclosure. As we demonstrated above, Senator McClellan, upon whose comments the Government relies, Sen. Rep. No. 1097, supra, does not suggest that a defendant in a criminal case who has standing to object to an illegal overhearing of his own conversations ought not receive the materials, "at least [concerning] the subject." Id. at 105. We are not here concerned with the meaning of this provision

- of the 1970 Act which "is not applicable to the overhearing involved here, which occurred after June 1968." Government's Brief at 42. But we note in passing that the equation of meaning for the 1968 and 1970 Acts reflected in Senator McClellan's remarks, 116 Cong. Rec., supra, would indicate that nothing in the 1970 Act as well would limit the right of a defendant to full disclosure of his own words.
- . 3) The Government's reason for arguing the need to reverse Alderman in the area of national security surveillance is clearly as a fall-back position in the event that the Court determines the underlying issue of legality against it. However, in developing its reasons for overruling Alderman, the Government has indicated that it will continue its program of warrantless investigative national security surveillances regardless of the outcome. The Government has identified a series of problems that will be caused by a requirement of automatic disclosure of illegally seized conversations to a defendant in a criminal case. Persons who have had an innocent conversation with those who are prosecuted and receive the disclosure, persons who are merely referred to, and Government informants and their families may be harmed by disclosure, we are told. "Pending investigations and prosecutions can be significantly impaired . . . "Government's Brief at 38. We are told that "all these problems are compounded in national security cases, where intelligence gathering is the objective and secrecy is absolutely necessary." Id. at 39. This is a strange assertion indeed for the Government to be making in the context of arguing against the disclosure requirement of Alderman should this Court determine the fundamental issue of legality against the Government. The Government has even suggested that a requirement of absolute disclosure "may even encourage defendants to telephone persons or locations that they suspect may be the subject of surveillance." Id. at 40. We would hope that a holding of illegality by this Court would foreclose this possibility since these locations would not be taped.

We must assume that if this Court should determine the fundamental issue of legality of so-called national security electronic surveillance against the Executive, that such surveillance will cease.<sup>53</sup>

It is intolerable to contemplate that the Attorney General, an officer of this high Court, may even consider the continued utilization of "this dirty business" if this Court should determine that warrantless investigatory electronic surveillance is a violation of the Fourth Amendment. "In a government of laws existence of the government will be imperiled if it fails to observe the law scrupulously ....". Olmstead, supra, Brandeis dissenting at 485. The unfortunate history of continued Executive investigative surveillance following the decision in Nardone v. United States. 302 U.S. 379 (1937), should not be precedent for the same sorry effort by the Executive to avoid present constitutional and statutory protections against intrusions by the "uninvited ear." See Katz v. United States, 398 U.S. 357 (1967) and 18 U.S.C. 2510 et seq. "In a government of laws" such a warning ought not be necessary, but in the words of Mr. Justice Stewart, in Giordano v. United States, 394 U.S. 310, 315 (1969),"... the most carefully written opinions are not always carefully read-even by those most directly concerned."

In evaluating the Government's desire for a reconsideration of the Alderman decision, we urge this Court to consider what would result from the total insulation of the Executive's program of national security surveillance from the hard inquiry of adversary proceedings. In the twenty-four

See the opinion of Judge Ferguson in United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971), pending decision on Writ of Certiorari to this Court. Judge Ferguson confronted this very problem because the Executive boldly stated an intention to continue a program of investigative electronic surveillance even if the surveillance in the Smith case was ruled illegal and thereby not sanctioned by the District Court. See Government's Brief in the District Court at p. 3. See also p. 4 of the Government's Brief in the District Court in this case where the identical language is set forth.

years since the Nardone decision, investigative surveillance went forward with little or no scrutiny from the Courts, and with no knowledge on the part of the American people save the general innuendo precipitated by the occasional leak.<sup>54</sup>

It is the hope of many, including the Congress (see Point II, supra), that the decisions of this Court in Katz and Berger and the comprehensive legislation of their constitutional principles in 18 U.S.C. 2510, et seq. will end the "dirty business" that has plagued us since the early twenties.

We respectfully submit that the only way the protection of privacy envisioned by Katz, supra, can be accomplished is by limiting the Government to the narrow proscriptions of 18 U.S.C. 2510 et seq. and to the decisions in this Court for the conduct of its electronic surveillance activities. The only way this can be effected is through the time-honored process of litigation of the issue of taint after full disclosure in each and every case where the existence of surveillance is acknowledged. As the Sixth Circuit rightly concluded:

These considerations, of course, primarily affect this trial. Far more important, however, is the fact that disclosure may well prove to be the only effective protection against illegal wirefapping available to defend the Fourth Amendment rights of the American public. App. 67-68.

The "talisman" of national security has already been rejected by this Court as a reason for insulating the Government from the requirement of disclosure. See Point I.B.2 and 3, and Alderman at 181 and 184, both supra. And this result was reached, and ought not be overturned here, because the Government candidly told the Court in Alderman that it really could not "distinguish between that which threatened [the national security] and that which did not." Id at 181-182, n. 13. For reasons already argued above, the

<sup>&</sup>lt;sup>54</sup>Significantly, the business of prosecuting criminals was not furthered one iota by electronic surveillance. See R. Clark, *Crime in America*, pp. 289-290 (1970).

Court found similar difficulties in "distinguishing between records which are relevant to showing taint and those which are not." Id.

The difficulties in determining taint have not changed. The Alderman decision and the legislation that preceded it (18 U.S.C. 2510 et seq.) now require that the Government reveal its "dirty business" to litigants. The Government's desire to continue to shield its unlawful activities from public view cannot overturn a determination by this Court that the only way the imposing protections of the Fourth Amendment can be effectuated is by requiring disclosure of unlawfully overheard conversations to a defendant who has standing to object to their use in a trial.

This Court should not reconsider its decision in Alderman v. United States, as the Government now suggests. The fundamental principles of liberty embodied in the Fourth Amendment require the salutory impact of its thoughtful conclusions.

#### IV

REMAND TO THE COURT OF APPEALS WITH DIRECTIONS TO DISMISS THE WRIT OF MANDAMUS AND TO REINSTATE THE DISCLOSURE ORDER OF THE DISTRICT COURT WOULD BE IN ORDER IF THE COURT SHOULD CONSIDER APPELLATE REVIEW BY WAY OF MANDAMUS INAPPROPRIATE AT THIS STAGE OF THE CRIMINAL PROCEEDINGS.

As we have argued throughout this brief, this case brings to the Court issues the resolution of which may well determine the continued vitality of constitutional government. There may, however, be some question concerning the appropriateness of appellate review by way of mandamus at this stage of the criminal proceedings. Cf. Will v. United States, 389 U.S. 90 (1967). Respondent-defendants' view of this question requires a frank expression of concern for the values involved. We believe, and we have so argued to

the Court, that it would be in the best interest of the parties to this proceeding, as well as the nation itself, if this Court decisively rejects the Executive's claim of power to engage in warrantless wiretapping of the type involved in this case. The very raising of the spectre of a system of domestic espionage and surveillance requires, as we have here urged, a reaffirmation by this Court of the fundamental values embodied in the First and Fourth Amendments. Cf. Coolidge v. New Hampshire, 403 U.S. 443 (1971), and New York Times v. United States, 403 U.S. 713 (1971).

We believe that the Executive itself is also desirous of a constitutional resolution in this case. In the more than thirteen criminal prosecutions in which this issue has emerged following the first claim of power to engage in such wire-tapping which occurred in June, 1969, in *United States v. Dellinger, supra*, the Executive has sought judicial sanction for its new program of domestic espionage. Many of these courts have recognized the awesome consequences of this claim of power. The analysis of the court below reflects this deep concern:

"At issue in this case is the power of the Attorney General of the United States as agent of the President to authorize wiretapping in internal security matters without judicial sanction.

This case has importance far beyond its facts or the litigants concerned.

If decided in favor of the government, the citizens of these United States lose the protection of an independent judicial review of the cause and reasonableness of secret recordation by federal law enforcement of thoughts and expressions which have been uttered in privacy. If decided in favor of the respondent, it may prejudice an important criminal

<sup>55</sup> United States v. Hoffman, (Cr. No. 973-71, D.D.C. Nov. 23, 1971); United States v. Ahmad, (No. 14950, M.D.Pa. Nov. 12, 1971); United States v. Donghi, (Cr. 1970-81, W.D.N.Y. May 14, 1971); United States v. Hilliard, (No. 169-141, N.D.Cal. May 4, 1971); United States v. Smith, (No. 4277-CD, C.D.Cal. Jan. 8, 1971).

prosecution. And more important, of course, in all future surveillances undertaken in internal security matters, it may add at least some dimension of risk of exposure of federal investigatorial intentions. United States v. United States District Court, App. 9-10.

However, although this Court will undoubtedly be required to determine at some point the monumental questions that the Government has submitted to litigation here, these questions need not necessarily be decided at this stage of this proceeding. This is because there may be questions concerning the propriety of review by way of mandamus at this point in the case.

The propriety of review on the merits at this point of this criminal litigation by the Court of Appeals and now by this Court may have to be considered in light of the long standing federal policy against interlocutory review. Review sought during or before trial runs counter to the requirement of "finality [that] as a condition of review is an historic characteristic of federal appellate procedure." Cobbledick v. United States, 309 U.S. 323, 324 (1940).

The Government must meet a heavy burden to overcome this presumption against reviewability. "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies... reserved for really extraordinary causes." Ex parte Fahey, 332 U.S. 258, 259 (1947).

In the recent case of Will v. United States, 389 U.S. 90 (1967), this Court outlined criteria for invocation of the extraordinary writ:

"The peremptory writ of mandamus has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circum-

stances amounting to a judicial 'usurption of power' will justify the invocation of this extraordinary remedy. DeBeers Consol. Mines, Ltd. v. United States. 325 U.S. 212, 217 (1945). Id. at 95.

Judge Keith's order requiring disclosure of electronic surveillance can in no way be characterized as an abuse of discretion, usurpation of judicial power, or refusal to act where he had duty to do so. Furthermore, the Government cannot justify interlocutory review in the present posture of this case, upon its claim that Judge Keith may have erred in ruling on matters within his jurisdiction. The Court's opinion in Will, supra, is helpful on this point:

"Nor do we understand the Government to argue that a judge has no 'power' to enter an erroneous' order. Acceptance of this semantic fallacy would undermine the settled limitations upon the power of an appellate court to review interlocutory orders. Neither 'jurisdiction' nor 'power' can be said to 'run the gauntlet of reversible errors.' Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382 (1953). Courts faced with petitions for the peremptory writs must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.' De Beers Consol. Mines, Ltd. v. United States, 315 U.S. 212, 223, 225 (1945) (dissenting opinion) Mr. Justice Douglas). Id. at 98, n. 6.

Mandamus may be further inappropriate because this case is a criminal proceeding and interlocutory review has

<sup>&</sup>lt;sup>56</sup>We note that the Government does not claim, nor can it on this record, that mandamus will lie under this Court's decision in *La Buy* v. Howes Leather Co., 352 U.S. 249 (1957), to correct a disregard by the District Court of the limitations of the federal rules.

stayed the resolution of the charges against the defendants and thus served to deprive them of their right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution. Will, supra at 96; DiBella v. United States, 369 U.S. 121, 126 (1962); Klopfer v. State of North Carolina, 386 U.S. 213 (1967).<sup>57</sup>

This Court has often expressed the policy that "appeals by the Government in criminal cases are something unusual, exceptional, and not favored." Carroll v. United States, 354 U.S. 394, 400 (1957); see Will v. United States, supra at 96; United States v. Sisson, 399 U.S. 267, 290 (1970). Thus, the Criminal Appeals Act, 18 U.S.C. Sec. 3731, is strictly construed against the Government's right of appeal, Carroll, supra at 399-400. This Court in Sisson, supra, noted the legislative history of the enactment of the Criminal Appeals Act as reflecting the attitude of Congress toward government appeals:

"[T]he legislative history reveals a strong current of congressional solicitude for the plight of a criminal defendant exposed to additional expense and anxiety by a government appeal and the incumbent possibility of multiple trials. For the Criminal Appeals Act, thus born of compromise, manifested a congressional policy to provide review in certain instances but no less a congressional policy to restrict it to the enumerated circumstances." Id at 298-299.

As this Court said in Will, supra, "mandamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies." Id. at 97. Thus, it is irrelevant to the appropriateness of mandamus, whether or not the Government may obtain review upon dismissal of the

<sup>&</sup>lt;sup>57</sup>Compare 18 U.S.C. 3731 as amended which provides for expedited appeals from suppression orders issued before trial in cases after the effective date of the act. This is clearly not such a case.

indictment for failure to disclose. 58 DiBella v. United States, 369 U.S. 121, 130 (1962).

The Court reaffirmed this principle in Will, supra:

drastic limits upon the Government's right of review in criminal cases that it would be completely unable to secure review of some orders having a substantial effect on its ability to secure criminal convictions. This Court cannot and will not grant the Government a right of review which Congress has chosen to withhold. Carroll v. United States, 354 U.S. 394, 407-408 (1957). We may assume for purposes of this decision that there may be no other way for the Government to seek review of individual orders

This Court expressly reserved decision in Will as to whether the Government could appeal in the event that the District Court dismissed the indictments because of its failure to comply with the bill of particulars order. Will, supra, at 96 n. 5. Further, we note that in United States v. Hilliard, (No. 71-2097, Ninth Circuit), the Government urges that it may, appeal the dismissal of an indictment for failure to disclose electronic surveillance.

It simply is not true that as a matter of law it is beyond controversy that there is no remedy except by extraordinary writ. Mandamus is certainly easy and expedient for the Government, but it is not exclusive or appropriate. We also note that this very issue is on appeal after jury conviction in U.S.A. v. Dellinger, (No. 18295 Seventh Circuit Court of Appeals) and a judgement against the Government or the Appellants could be brought to this Court by Writ of Certiorari to the Seventh Circuit.

<sup>58</sup> Although the non-appealability of the order or issue involved in the proceedings below is not relevant or dispositive of the question of the jurisdictional requirements of mandamus, we are compelled to point out that it is nevertheless incorrect to state as a matter of law that the Government has no other method of review in this case.

We do not purport to make the Government's case with regard to appeal, but simply indicate options which might be available upon dismissal of the case. We assert that Judge Keith's order is not appealable within the present posture of the case, but this is not to say that the issue presented—the legality of the governmental surveillance and the order for disclosure—is only reviewable by mandamus and at this stage of the proceedings.

directing it to fill bills of particulars." Id. at 97 n. 5.

The Sixth Circuit Court of Appeals justified interlocutory review on the merits on two grounds: (1) the importance of the issue to both parties, and (2) the fact that the issue is a matter of first impression in the appellate courts. Respondents are heartened by the Sixth Circuit's rejection of the Government's extravagant claim of authority to conduct surveillance free from judicial scrutiny. However, it is not clear that the issue was ripe for review in the Court of Appeals. A consequence of such review is delay of a criminal proceeding.<sup>59</sup>

If this Court should determine that the constitutional issues involved ought not be decided on the record of this case because of the manner of review by Writ of Mandamus in the Court of Appeals, a remand to the Court of Appeals to dismiss the Writ of Mandamus would be entirely appropriate. The consequence of a dismissal of the Mandamus proceeding would be to reinstate the disclosure order of the District Court. The criminal trial in this cause could then go forward or, the Government could then seek appellate review from an order dismissing the indictment in this cause if it chose not to disclose the logs of the illegal surveillances.

#### CONCLUSION

There have been some cases in the history of this Court of such "peculiar delicacy", *Marbury v. Madison*, 1 Cranch 137 (1803) that they have placed in the balance the continued existence of the values adhered to by the "authors"

<sup>59</sup>We note in this regard the remarks of the Chief Justice at the convention of the American Bar Association, deploring "the hydra of excess proceduralisms, archaic formalisms, pretrial motions appeals, continuances, collateral attacks, which can have the effect of dragging justice to death and stealing the very life out of the law." New York Times, p. 1, July 17, 1971.

of our fundamental constitutional concepts", Coolidge v. New Hampshire, supra, at 455 (opinion of Mr. Justice Stewart). These cases arise at the crossroads of our history as a Nation; at those moments when the pressures and conflicts of the day cause even those who sit in places of high position to seek to throw off the restraints and limitations which the founders placed upon the exercise of governmental power. As this Court warned last Term, in "times of unrest, whether caused by crime or racial conflict or fear of internal subversion" the restraints and limitations of the "basic law and the values that it represents may appear unrealistic or 'extravagant' to some." Coolidge v. New Hampshire, supra at 455. At such a moment, fraught with the gravest danger for the continued vitality of a system of government which does "not exalt order at the cost of liberty" Whitney v. California, supra at 377 (concurring opinion of Mr. Justice Brandeis), these cases which touch the "bedrock of our political system," Reynolds v. Sims, supra, invoke the most awesome "responsibility of this Court as the ultimate interpreter of the Constitution." Baker v. Carr, supra at 211. When one branch of government, no matter how powerful, attempts to "overleap the great barrier which defends the rights of the people," Madison, Memorial and Remonstrance, supra, it is the solemn duty of this Court to repudiate such incursions into the freedoms which made this a "government of laws and not men." It is in such cases that this Court faces anew at each turning point in our history the unflinching question put by the first Chief Justice in the troublesome first days of the Republic: "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?" Marbury v. Madison, supra. This is once again such a case, and once again this Court faces the ultimate question placed by the great Chief Justice.

In the name of "necessity", in the name of "expediency", in the name of "security", the representatives of the present Executive reflecting a growing tendency to

regard the values of personal liberty embodied in the founding covenants as "unrealistic" and "extravagant", cf. Coolidge v. New Hampshire, have asked this Court to sanction a claim of power unprecedented in the history of the Republic. Espousing a doctrine this Court once characterized as having the most "pernicious consequences," Ex parte Milligan, 4 Wall, at 295, the present administration seeks the virtual suspension of the guarantees of the Fourth and First Amendments to permit the institution in this country of a sweeping system of warrantless general searches and seizures of the ideas, words and opinions of American citizens through that most odious weapon of "tyranny and oppression", electronic wiretapping and surveillance. Cf. Olmstead v. United States, supra (concurring opinion of Justice Brandeis).

Those who founded this nation "by revolution on this continent", Coolidge v. New Hampshire, supra, feared most the "abuse of executive authority," Cooley's Constitutional Limitations, supra, manifested in the hated general searches. It is of deep significance that they looked to the protection of the "neutral and detached magistrate required by the Constitution," Coolidge, supra, 403 U.S. at 453. In. rejecting the extraordinary claim advanced here by the Executive this Court will be not only exercising its his toric and ultimate role to interpret, defend and preserve the written fundamental law. Marbury v. Madison, Baker v. Carr, Powell v. McCormack, all supra. By enforcing the mandate of the Fourth Amendment, its very "point", Coolidge v. New Hampshire, the constitutional requirement of the prior judicial approval of a "neutral and detached magistrate," this Court will be vindicating the historic role of the judiciary shaped and fashioned by the founders, to be the ever present champions of the liberties of the people, the "impenetrable bulwark against every assumption of power" by the other branches of government. Only this last Term of Court, in resisting a bid for arbitrary power by the Executive which would have entrenched upon the basic freedoms of the people, Mr. Justice Black, in his

last opinion for this Court, had the occasion to remind us all of the words of James Madison, the author of the First Amendment:

"If they [ the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights, 1 Annals of Cong., 439. 403 U.S. at 718, 719.

Once again this Court is called upon to be "an impenetrable bulward against" an "assumption of power" by the Executive. The judgment below of the Court of Appeals should be affirmed.

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DATED: December 15, 1971

<sup>\*</sup>Attorneys for Respondents acknowledge the invaluable assistance of Linda Huber, University of Washington, School of Law 1971, in the preparation of this brief.

1) United States v. Dellinger, et al., USD.C. ND. III. 69 CR 180

Defendants moved prior to trial for disclosure of any electronic surveillance concerning them.

6/69 Attorney General Mitchell's affidavit:

(1) Defendants participated in conversations overheard by taps used (a) to gather foreign intelligence information, or (b) to gather intelligence information concerning domestic organizations which seek to use force & other unlawful means to attack & subvert existing structure of government; (2) It would prejudice National interest to disclose particular facts concerning this surveillance other than to the Court in camera. Additional surveillances were revealed during and after

Post Trial 2/26/70

(1) After examination of government's submission in camera & hearing oral arguments & briefs, District Court concluded such surveillance was lawful & therefore required no disclosure to defendants. (2) District Court further concludes that no constitutional rights of any defendants were infringed. (3) As to additional unlawful surveillance Court found trial evidence was not tainted by the unlawful act.

2) United States v. O'Neal US.D.C. Kansas 8/6/70 KC-CR1204

Defendant moved for disclosure.

8/6/70 Attorney General Mitchell's affidavit: (1) wiretaps were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack & subvert the existing structure of the government. (2) would prejudice national interest to disclose other than in camera.

9/1/70 District Court tapes were legally obtained as President may gather intelligence information having to do with matters vital to national security.

3) United States v. Smith : US.D.C. CD Calif. 321 F. Supp. 424 Crim. No. 4277-CD

On appeal of conviction to Court of Appeals Government disclosed to Court of Appeals that it had found that defendant had participated in conversations which were electronically monitored - remanded to District Court for proceedings required by Alderman v. United States.

- from Opinion of U.S.D.C. J. Ferguson (1/8/71).

(1) Defendant overheard during gathering of information deemed necessary to (a) protect the nation from attempt of domestic organizations to use unlawful means to attack & subvert the existing structure of government. (2) Decision to initiate surveillance in this type of case must be based on wide variety of considerations & on many pieces of information which cannot readily be presented to a magistrate (Gov't brief at 8).

On 1/8/71 District Court holds electronic surveillance was constitutionally improper & order Government to disclose fully to defendant so hearing may be held to see if evidence at trial was tainted. - 30 day stay of order for government appeal.

This Appendix omits reference to those cases concerning electronic surveillance for the sole purpose of pthering foreign security intelligence information. E.g., United States v. Clay, United States v. Stone, United States v. O'Baugh, United States v. Ivanov & Butenko, all discussed, supra.

Defendants moved prior to trial for disclosure of any electronic surveillance concerning them.

6/69 Attorney General Mitchell's affidavit: (1) Defendants participated in conversations overheard by taps used (a) to gather foreign intelligence information, or (b) to gather intelligence information concerning domestic organizations which seek to use force & other unlawful means to attack & subvert existing structure of government; (2) It would prejudice National interest to disclose particular facts concerning this surveillance other than to the Court in camera. Additional surveillances were revealed during and after trial.

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On Appeal Court of Appeals 7th Cir. to be argued in February 1972.

Defendant moved for disclosure.

8/6/70 Attorney General Mitchell's affidavit: (1) wiretaps were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack & subvert the existing structure of the government. (2) would prejudice national interest to disclose other than in camera.

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On 1/8/71 District Court holds electronic surveillance was constitutionally improper & order Government to disclose fully to defendant so hearing may be held to see if evidence at trial was tainted. - 30 day stay of order for government appeal.

On 6/22/71 Court of Appeals 9th Cir. ordered "submission of above case is vacated pending decision of Supreme Court in United States v. Plamondon (Keith). Now case is on Writ of certiorari to this Court Ferguson v. United States, supra.

ference to those cases concerning electronic surveillance for the sole purpose of intelligence information. E.g., United States v. Clay, United States v. Stone, United States v. Ivanov & Butenko, all discussed, supra.

4) United States v. Sinclair, et al., U.S.D.C. ED Mich. 12/18/70 No. 44375 Defendants moved interalia for disclosure of certain electronic surveillance information prior to trial.

12/18/70 Attorney General Mitchell's affidavit:
(1) Defendant has participated in conversations overheard by taps used (a) to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack & subvert existing structure of govern-

disclose particular facts other than to the Court in camera.

ment. (2) It would prejudice national interest to

5) United States v. Hilliard U.S.D.C ND Calif. 6/71 Case No. 69-141 Crim.

Defendant moved for discovery and suppression of electronic surveillance information prior to trial.

4/71 Attorney General Mitchell's affidavit: (1) opposed disclosure to defendant of his conversations overheard during course of National security surveillance of telephones. (2) These surveillances were authorized by Presidents through their Attorney Generals and were deemed necessary either (a) to protect against a clear and present danger to the security of the United States posed by organizations and individuals who seek to attack and subvert by violence and otherunlawful means the existing structure of the Government or (b) to protect the Nation against actual or potential attack or (c) any other hostile action of a foreign power - the decisions to authorize were considered in conjunction with the entire range of foreign and domestic intelligence available to Executive branch. (3) I certify that it would be a practicable impossibility to submit to the Court all facts, circumstances upon which surveillance was based and further would prejudice National interest other than to the Court in cam12/18/70 Attorney General Mitchell's affidavit:

(1) Defendant has participated in conversations overheard by taps used (a) to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack & subvert existing structure of government. (2) It would prejudice national interest to disclose particular facts other than to the Court in camera.

4/71 Attorney General Mitchell's affidavit: (1) opposed disclosure to defendant of his conversations overheard during course of National security surveillance of telephones. (2) These surviallances were authorized by Presidents through their Attorney Generals and were deemed necessary either (a) to protect against a clear and present danger to the security of the United States posed by organizations and individuals who seek to attack and subvert by violence and other uhlawful means the existing structure of the Government or (b) to protect the Nation against actual or potential attack or (c) any other hostile action of a foreign power - the decisions to authorize were considered in conjunction with the entire range of foreign and domestic intelligence available to Executive branch. (3) I certify that it would be a practicable impossibility to submit to the Court all facts, circumstances upon which surveillance was based and further would prejudice National interest other than to the Court in cam1/25/71 District Court holds surveillance is illegal & orders government to disclose information sought. 48 hour stay for appeal.

To United States Court of Appeals 6th Cir. on petition for writ of mandan - On 4/8/71 Court denie government petition for writ of mandamus & hold that District Court properly found conversations of defendant were illegal intercepted & hence District Court disclosure order is not an abuse of judicial discretion. Order affirmed - 6/21/71 Cert. granted, U.S. Supreme Court.

6) United States v. Juffe & Donghi
U.S.D.C. WD N.Y.
1/7/71
CR 1970-81

Defendant moved for discovery & inspection or records relating to electronic surveilprior to trial. 1/7/71 Attorney General Mitchell's affidavit:
Defendant has participated in conversations which
were overheard (a) to gather intelligence information deemed necessary to protect the Nation
from attempts of domestic organizations to attack
and subvert the existing structure of government.

(2) it would prejudice the National interest to disclose other than to the Court in camera.

5/14/71 District Court finds surveillance constitutionally improper and orders government to disclose fully to defendant its surveillance records. — government granted stay of 15 days if failure to comply then judge will direct indictment to be dismissed.

7) United States v. Rudd, et al., U.S.D.C. ED Mich. 9/19/71 Defendants moved for disclosure of electronic surveillance prior to trial. 9/19/71 Attorney General Mitchell's affidavit:
(1) Electronic surveillances were authorized by President through Attorney General in exercise of his authority relating to the National security as set forth in 18 U.S.C. 2511 (3). My authorizations for such surveillances were in response to the requests of the Director of the FBI, which requests were considered in conjunction with all foreign and domestic intelligence available to the executive. (2) I certify that it would be a practicable impossibility to submit to the Court all the facts, circumstances upon which each authorization was based,—further it would prejudice to disclose other than to the Court in camera.

Pending

Defendant moved for discovery & inspection or records relating to electronic surveilprior to trial.

1/7/71 Attorney General Mitchell's affidavit:
Defendant has participated in conversations which
were overheard (a) to gather intelligence information deemed necessary to profect the Nation
from attempts of domestic organizations to attack
and subvert the existing structure of government.

(2) it would prejudice the National interest to disclose other than to the Court in camera.

5/14/71 District Court finds surveillance constitutionally improper and orders government to disclose fully to defendant its surveillance records.

— government granted stay of 15 days if failure to comply then judge will direct indictment to be dismissed.

7/8/71 United States Court of Appeals 2nd Cir. - As same important issue here as in (Keith) Cert. granted. Accord ingly, petition for mandamus is denied without prejudice. The criminal proceeding (instant) will not be dismissed nor will disclosure of the sealed exhibits be required, nor will any further orders be entered by J. Curtin pending disposition by Supreme Court of the (Keith) case.

Defendants moved for disclosure of electronic surveillance prior to trial. 9/19/71 Attorney General Mitchell's affidavit: (1) Electronic surveillances were authorized by President through Attorney General in exercise of his authority relating to the National security as set forth in 18 U.S.C. 2511 (3). My authorizations for such surveillances were in response to the requests of the Director of the FBI, which requests were considered in conjunction with all foreign and domestic intelligence available to the executive. (2) I certify that it would be a placticable impossibility to submit to the Court all the facts, circumstances upon which each authorization was based.—further it would prejudice to disclose other than to the Court in camera.

Pending

8) United States v. Eqbal Ahmad, et al., U.S.D.C. MD Pa. 5/13/71

Crim. No. 14950

Defendants moved for disclosure of electronic surveillance prior to trial.

authorized by President through Attorney General and was one deemed necessary to protect. against a clear and present danger to the structure or existence of the United States - the decision to authorize such surveillance . . . was considered in conjunction with the entire range of foreign and domestic intelligence available to the Executive. (2) I certify it would be a practicable impossibility to submit to the Court all facts, circumstances upon which authorizations were based. Further it would prejudice the national interest to disclose other than to the Court in camera.

5/13/71 Attorney General Mitchell's affidavit:

(1) The surveillance of the telephone was one

9) United States v. Jaffe and Beiber E.D. N.Y.

June 18, 1971 No. 71 Crim. 480

10) United States v. Hoffman, D.D.C.

November 23, 1971 No. 973-71

On motion to disclose electronic surveillance prior to trial.

On motion to disclose

Government admitted surveillance but claimed it was legal since President has the power in matters involving foreign affairs, and domestic security situations and analogous.

.5/13/71 Attorney General Mitchell's affidavit:
(1) The surveillance of the telephone was one authorized by President through Attorney General and was one deemed necessary to protect against a clear and present danger to the structure or existence of the United States — the decision to authorize such surveillance . . . was considered in conjunction with the entire range of foreign and domestic intelligence available to the Executive. (2) I certify it would be a practicable impossibility to submit to the Court all facts, circumstances upon which authorizations were based. Further it would prejudice the national interest to disclose other than to the Court in camera.

District Court on 11/12/71 suppressed as illegal the overheard conversations of defendants. The Court deferred until after trial the question of the possible taint of evidence from the illegally overheard conversations.

Trial judge ordered disclosure to the defendants for a determination of the question of legality of the surveillance.

Case resolved on other

Government admitted surveillance but claimed it was legal since President has the power in matters involving foreign affairs, and domestic security situations and analogous.

Four of the five surveillances were of domestic organizations. The fifth concerned foreign intelligence activities. District Court required disclosure where surveillance was of a domestic character. Court recognizes foreign security surveillance is an open question and held that this single interception was legal. Determination of taint deferred until end of trial. District Court stayed its order on the motion of the Government until decision in U.S.A. v. District Court on December 8, 1971.

11) United States v.
Bacon

S.D.N.Y. 71 Criminal 687 Affidavit of October 1971 by Attorney General Demand for disclosure prior to trial.

Attorney General Mitchell's affidavit: Said electronic surveillances were authorized by the President acting through Attorney General in exercise of his authority relating to national security as set forth in 18 U.S.C. 2511(3). Authorization to engage in surveillance was in response to a request from FBI considered in conjunction with all of the foreign and domestic intelligence information available to the Executive Branch of the Government.

Trial and disposition of issue stayed pending decision in United States v. United States District Court. Demand for disclosure prior to trial.

**HOW WAS ISSUE RAISED** 

Attorney General Mitchell's affidavit. Said electronic surveillances were authorized by the President acting through Attorney General in exercise of his authority relating to national security as set forth in 18 U.S.C. 2511(3). Authorization to engage in surveillance was in response to a request from FBI considered in conjunction with all of the foreign and domestic intelligence information available to the Executive Branch of the Government.

Trial and disposition of issue stayed pending decision in United States v. United States District Court.

#### APPENDIX B

### UNITED STATES CONSTITUTION

### First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## OMMUNICATIONS ACT OF 1934, 47 U.S.C. § 605 [1934]

## § 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or

foreign communication by wire or radio and use the same or a formation therein contained for his own benefit or for the hof another not entitled thereto; and no person having received intercepted communication or having become acquainted with contents, substance, purport, effect, or meaning of the same of part thereof, knowing that such information was so obtained, divulge or publish the existence, contents, substance, purport, or meaning of the same or any part thereof, or use the same of information therein contained for his own benefit or for the boof another not entitled thereto: Provided, That this section shall apply to the receiving, divulging, publishing, or utilizing the tents of any radio communication broadcast, or transmitted by ateurs or others for the use of the general public, or relating to a in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

## OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, 18 U.S.C. § § 2510-20 [1968]

## § 2510. Definitions

As used in this chapter-

- (1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;
- (2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstance justifying such expectation;
- (3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

- (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;
- (b) a hearing aid or similar device being used to correct. subnormal hearing to not better than normal;
- (6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;
- (7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;
- (8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;
  - (9) "Judge of competent jurisdiction" means-
    - (a) a judge of a United States district court or a United States court of appeals; and
    - (b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;
- (10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and
- (11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

- § 2511. Interception and disclosure of wire or oral communications prohibited
- (1) Except as otherwise specifically provided in this chapter any person who—
  - (a) willfully intercepts, endcavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;
  - (b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—
    - (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or
    - (ii) such device transmits communications by radio, or interferes with the transmission of such communication; or
    - (iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or
    - (iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States:

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

- (2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: Provided, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.
- (b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.
- (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.
- (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.
- (3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the

exercise of the foregoing powers may be received in evidence in a trial hearing, or other proceeding only where such interception w reasonable, and shall not be otherwise used or disclosed except is necessary to implement that power.

## § 2515. Prohibition of use as evidence of intercepted wire of

Whenever any wire or oral communication has been intercepted no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

# § 2516. Authorization for interception of wire or oral or munications

- specially designated by the Attorney General, may authorize an a plication to a Federal judge of competent jurisdiction for, and sur judge may grant in conformity with section 2518 of this chapters order authorizing or approving the interception of wire or oral or munications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense to which the application is made, when such interception may provide or has provided evidence of—
  - (a) any offense punishable by death or by imprisonment in more than one year under sections 2274 through 2277 of the 42 of the United States Gode (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapter of this title: chapter 37 (relating to espionage), chapter 16 (relating to sabotage), chapter 115 (relating to treason), sehapter 102 (relating to riots);
    - (b) a violation of section 186 or section 501(c) of title 2. United States Code (dealing with restrictions on payments as loans to labor organizations), or any offense which involve murder, kidnapping, robbery, or extortion, and which is punishable under this title;

- (c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of driminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);
- (d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;
- (e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;
- (f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or
  - (g) any conspiracy to commit any of the foregoing offenses.
- (2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or of al communications

- (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
- (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
- (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.
- (4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.
- gaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

## 2518. Procedure for interception of wire or oral communications

- (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
  - (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
  - (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
  - (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
  - (d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;
  - (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and
  - (f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(8) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that-

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through

such interception:

(e) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

- (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.
- (4) Each order authorizing or approving the interception of any wire or oral communication shall specify-
  - (a) the identity of the person, if known, whose communications are to be intercepted;
  - (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
  - (e) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
  - (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
  - (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

- (5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective. or in any event in thirty days.
- (6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.
- (7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—
  - (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
  - (b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without

an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the

issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

- (b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.
- (c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.
- (d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—
  - (1) the fact of the entry of the order or the application;

- (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
- (3) the fact that during the period wire of oral communica-

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an exparte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

- (9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.
- (10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
  - (i) the communication was unlawfully intercepted;
  - (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
  - (iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

# § 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person-

- (a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;
  - (b) punitive damages; and
- (c) a reasonable attorney's fee and other litigation costs resonably incurred.

A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.

# ORGANIZED CRIME CONTROL ACT OF 1970, 18 U.S.C. § 3504.

# \$ 8504. Litigation concerning sources of evidence

- (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
  - (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;
  - (2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968; or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

- (3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.
- (b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

# In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN-DISTRICT OF MICHIGAN, SOUTHERN DIVISION and HONORABLE DAMON J. KEITH

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

# REPLY BRIEF FOR THE UNITED STATES

1. Respondents treat this case as if the electronic surveillance were directed at the respondent-defendant Plamondon in connection with a routine criminal investigation designed to uncover evidence of crime. If that were the theory upon which the Attorney General authorized the surveillance involved in this case, there would be a clear basis in the decided cases for the respondents' contention that the government's failure to obtain prior judicial authorization made it

an unreasonable search and seizure in violation of the Fourth Amendment.

As developed in our main brief (pp. 15-19, 23-28), however, the surveillance in the present case is of an entirely different character, and is governed by different principles. The surveillance ordered in this case was not in connection with a criminal investigation but, as the Attorney General stated in his affidavit filed in the district court (App. 20), "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." Such surveillances stand on a different footing, and their validity involves different considerations than surveillances in ordinary criminal investigations. These intelligence gathering surveillances involve the authority of the President, acting through the Attorney General, to maintain our on-going intelligence apparatus necessary to deal with those forces, whether foreign or domestic, which threaten the nation's security. In engaging in this activity, the government is seeking information to be used by the President in aid of his constitutional responsibilities, not evidence to be used in a criminal prosecution.

It is, however, true that in the course of such surveillance evidence may be obtained that indicates the commission of a crime. In such an event the government contends that it would be fully warranted in using the evidence thus obtained in prosecuting the crime thus disclosed. As Justice Frankfurter pointed out for the Court in Abel v. United States, 362 U.S.

217, 238 (a case which involved a warrant issued not by a court but by a subordinate of the Attorney General in the Immigration and Naturalization Service): "When an article subject to a lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for." Cf. also S. Rep. No. 1097, 90th Cong., 2d Sess. 94 (1968). On the other hand, if the purpose of the particular surveillance was not intelligence gathering but obtaining evidence of crime, the evidence could not be introduced against the defendant unless the surveillance had prior judicial approval.

In this case, however, the surveillance was to gather intelligence information, and no evidence relating to any crime charged against the defendants was obtained in connection with this surveillance. But even if such evidence had been obtained the surveillance would, we submit, still retain its basic character as an intelligence gathering technique employed for the protection of the national security. Certainly the President has the authority to conduct surveillances of agents of foreign powers that he deems necessary to protect the country; for the reasons developed in our main brief, his authority is no less with respect to surveillance of a domestic organization actively engaged in an effort to overthrow our government by ferce.

Moreover, respondents offer no standard that the district court could apply in determining whether to authorize national security intelligence wiretaps, and

it is difficult to formulate a meaningful or appropriate guideline. In the usual criminal investigation, the standard is probable cause for believing that a crime is or has been committed by the particular person or at the particular premises authorized to be searched or seized. But what standard could a magistrate apply in determining whether to authorize surveillance for intelligence gathering purposes in national security situations? A court as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect. national security. By definition, such surveillance is designed to safeguard the national security before it is injured, not to develop evidence of such injury. The need for such surveillance rarely can be determined on the basis of simple facts and considerations; it frequently involves an evaluation of a large number of complex and subtle factors. The very nature of the judgment involved in deciding whether to authorize a particular national security surveillance itself indicates the inappropriateness of attempting to have a court pass upon the reasonableness of that judgment before the surveillance can be made.1

2. In arguing in our main brief (pp. 29-34) that the policy considerations involved in conducting for-

See Telford Taylor, Two Studies in Constitutional Interpretation (1969), where, in discussing ex parte orders authorizing electronic surveillance in the usual criminal case, he states, at p. 89: "The investigative issues do not lie within traditional judicial expertise; they are intrinsically police problems, and should be handled by the executive branch."

eign intelligence operations are closely interrelated to those involving national security surveillances, we stated that in comparing the two activities "no sharp and clear distinction can be drawn between 'foreign' and 'domestic' information." The respondent district judge seeks to convert this latter statement into the claim that there is no significant distinction "between foreign and domestic affairs" (Br. 68) and then argues (id., 68-71) that this Court and the Congress frequently have recognized that distinction.

While we recognize that, for many purposes, the authority of the President may be greater in the foreign than in the domestic field, the Chief Executive also is responsible for protecting the nation against domestic disorder and maintaining the stability of our society.

The preamble to the Constitution states that two of its purposes are to "insure domestic Tranquility" and to "promote the general Welfare." Before entering his office the President is required to take an oath that he will "preserve, protect and defend the Constitution" (Article II, Section 1). The Constitution enjoins him to "take Care that the Laws be faithfully executed" (Article II, Section 3). It requires the United States to guarantee to the States "a Republican Form of Government" and, upon request, to

In In re Neagle, 135 U.S. 1, 64, the Court noted that the President's duty to "take care that the laws be faithfully executed" extends not merely to enforcement of acts of Congress but to the enforcement of "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all of the protection implied by the nature of the government under the Constitution."

protect the states against "domestic Violence" (Article IV, Section 4).

These provisions make clear that the founding fathers intended to impose upon the President the duty, and correspondingly to elothe him with sufficient authority, to protect the country against all domestic threats, actual or potential, to the national security. Congress has explicitly recognized that authority. In 1795, the Second Congress granted the President broad power to suppress insurrection against both the federal and state governments. These provisions, now contained in 10 U.S.C. 331-336, authorize the President to call the militia into federal service and to utilize it and the armed forces to suppress any "insurrection" against a state government (10 U.S.C. 331), any "unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States" (10 U.S.C. 332), or "any insurrection, domestic violence, unlawful combination or conspiracy" that seriously interferes with the execution of the laws of the United States (10 U.S.C. 333).3 This authority answers the contention of the amici Black Panther Party, et al. (Br. 15) that under the Constitution Congress and "not the executive alone" may summon and utilize the militia "as an instrument of domestic policy."

In order properly to perform these functions of protecting the country against domestic disorders,

A detailed discussion of the President's authority and responsibilities under these statutes and the procedures he utilizes in enforcing them is contained in the Appendix to this brief.

however, the President must have complete and current information with respect to the activities of various groups that may threaten the national security. He cannot act in the dark; he must know what these groups are doing before he can determine what steps to take to meet his constitutional obligations, or to recommend to Congress, when to do so and by what means. The President's need for intelligence information with respect to threats to national security posed by so-called domestic organizations is no less than his need for such information with respect to threats posed by foreign ones. Although the authority of the President to protect the national security from both domestic and foreign threats is a different power from his authority to conduct foreign affairs, electronic surveillance of the type here involved often is employed in aid of both powers, i.e., to provide intelligence information needed to conduct foreign affairs and to protect the national security.

While there are situations in which it is easy to determine whether a particular activity involves foreign or domestic affairs, our point is that, in determining whether the Fourth Amendment forbids electronic surveillance solely because it is conducted without prior judicial authorization, it is not meaningful to draw a distinction between permitted and prohibited surveillance solely on the basis of whether the organization involved is deemed foreign or domestic. The "foreign/domestic" distinction drawn by respondents is, for the question presented here, one without a difference and one that is incapable of meaningful practical application.

The fact that an organization is "domestic" does not mean that its activities cannot involve foreign intelligence operations. A domestic organization, for example, may have a large number of significant foreign contacts and associations that may influence or, indeed, control its domestic activities. Similarly, individuals connected with the domestic organization themselves may have such foreign ties. It is a practical impossibility to apply the distinction to such an organization, unless one uses the principal geographic situs of the organization as the basis for application. The district court did not consider this problem, but grounded its decision on the fact that the organization, as distinguished from the intelligence sought, was "wholly domestic".

Moreover, it is unrealistic to assume that simply because an organization has a domestic situs, it is any the less a threat to the security of this country than an organization with a foreign situs. Quite the opposite proved true in the case of Nazi Germany's "Trojan Horse" apparatus employed prior to World War II. It is for these reasons that we submit that the President must have as broad authority to gather intelligence information through electronic surveillance in dealing with domestic organizations as he has in dealing with foreign ones.

<sup>&</sup>quot;Trojan horse—a device used by German Nazis, of placing espionage and propaganda agents inside the country of an intended victim for purposes of sabotage and direction of native subversion groups." Webster's New Collegiate Dictionary (1961 ed.).

- 3. The respondent district judge also urges (Br. 64) that however 18 U.S.C. 2511(3)—which is the standard the Attorney General follows in authorizing national security electronic surveillances-may be interpreted, the instant surveillance was invalid for failure of the affidavit of the Attorney General to employ the statutory language. The affidavit, however, was not the authorization for the surveillance. In response to defendant's motion under Rule 16, the affidavit was prepared and transmitted to the court together with the in camera submission. This submission contains the signed authorization of the Attorney General, documents characterizing the illegal activities and aims of the organization in question, including information relating to the means by which it intended to achieve its aims, a summary inventory of prior monitored conversations, a document relating to the previous authorization of the prior Attorney General, a description of the premises involved and all overhearings of the defendant-respondent Plamondon. Those documents, and not the affidavit, are the proper basis for determining the ground upon which the Attorney General acted.
- 4. The government argues in its main brief that if it is determined that electronic surveillance to protect national security is unlawful in the absence of prior judicial authorization, courts should be permitted to determine in camera whether illegal interceptions are arguably relevant to a prosecution before requiring disclosure to the defendant. With respect to this contention, it is not necessary here to reiterate the arguments in our main brief to the

effect that the rule of Alderman v. United States, 394 U.S. 165, is grounded in this Court's supervisory power; that the broad language of Alderman should be reexamined; and that Title VII of the Organized Crime Control Act of 1970 represents a congressional rejection of the approach to disclosure of the Alderman rule. We do believe, however, that a response is useful to respondents' attacks on our analysis of the scope and significance of the relevant provisions of the Omnibus Crime Control and Safe Streets Act of 1968.

Defendant-respondents find our suggestion that the 1968 Act supercedes the Alderman rule of automatic disclosure incredible because the Act precedes Alderman. Our point, however, is that in the 1968 Act. Congress prescribed detailed rules for electronic surveillance occurring after June 1968 and that this legislation, inapplicable to the pre-1968 surveillance involved in Alderman, indicates that automatic disclosure should not be required here. If our interpretation of the Act is correct, it negates a rule of automatic disclosure of information relating to national security as the penalty for a violation of the Act. If this Court should now hold that a prior court order is required, we think that, as it is clear Congress did not mandate automatic disclosure in situations governed by the 1968 Act, it would not wish a rule of broader disclosure for national security cases.

Although, in passing, the Court in Alderman referred to the Act on a different subject, 394 U.S. at 175-176, it did not mention the Act when it dealt with disclosure.

Judge Keith contends (Br. 79-83) that we have misinterpreted the disclosure provisions of the 1968 Act, and suggests that these provisions require automatic disclosure of the contents of any interceptions determined to be illegal. This interpretation is unsound for a number of reasons.

Section 2515, which Judge Keith cites (Br. 80), does establish an exclusionary rule for illegally obtained evidence. But it leaves open the process by which the relevance of the intercepted communications to proferred evidence is to be determined, and it is that process that is here in question.

Section 2518 (10) (a) provides, as respondents concede, something less than automatic disclosure upon the filing of a motion to suppress evidence. The section covers evidence derived indirectly from electronic surveillance as well as the intercepted communications themselves. In disposing of a motion concerning derivative evidence, a court is faced with both the question of the legality of the interception and with the question whether certain evidence is derived from the interception. In some cases the illegality of the interception will be conceded and the only point at issue will be whether the evidence is derived from the interception. Thus questions of the "relevance" of interception to evidence will be crucial in some cases and sometimes will be the only disputed issue.

If, as respondents argue, Congress had meant to establish automatic disclosure regardless of "arguable relevance" for any illegal interceptions, it surely would have indicated so explicitly. Instead it declined in Section 2518 (10) (a) to distinguish questions of legality from questions of relevance or "taint", and it refused to provide a rule of automatic disclosure for either, thus "explicitly recogniz[ing] the propriety of limiting access to intercepted communications or evidence derved [sic] therefrom according to the exigencies of the situation" (S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968)).

The passage from the Senate Report concerning Section 2518 (8) (d), which defendant-respondents cite (Br. 143) as Senator McClellan's remarks, do not support respondents' /position. Section 2518(8) (d) specifies that notice of the surveillance be given to the person against whom the surveillance is directed, and carefully specifies the required content of the notice, including whether communications were intercepted. The section provides only that the judge "may in his discretion" make available portions of the intercepted communications. The statement from the Report that "all authorized interceptions must eventually become known at least to the subject" (Rep. 1097, supra, p. 105), plainly refers only to the mandatory notice; there is no suggestion of an automatic disclosure rule concerning the contents of the communications authorized under § 2518.6

The legislative history of the 1970 Act reinforces our interpretation of the 1968 Act. As our main brief shows, pp. 44-46, both Congressman Poff and Senator McClellan, authoritative spokesmen for the

<sup>•</sup> Indeed, it was contemplated that even the mandatory notice might be postponed "almost indefinitely" (S. Rep. No. 1097, supra, at 105).

meaning of the Act, indicated that its disclosure provisions were in effect the same as those of the 1968 Act, and the 1970 Act specifically rejects automatic disclosure in favor of a requirement that only information relevant to a claim of inadmissibility need be disclosed.

- 5(a). Judge Keith points out (Br. 28, n. 16) that the statement in the government's brief (p. 18, n. 7)—based on statistics from the National Bomb Data Center—that there were 3285 bombings in the United States from January 1, 1970, to July 1, 1971, is incorrect. The statement in the government's brief resulted from our clerical error, attributed to a misinterpretation of a change in the reporting format of the National Bomb Data Center. The correct figures for that year, as Judge Keith states, are 1562 incidents involving 2022 bombs. The correct figures, however, reflect a monthly average of 130 "incidents" involving 170 bombs, or roughly 5.5 bombs every day for the year.
- (b). The amici American Civil Liberties Union et al. state (Br. 16-21) that the number of warrantless telephone national security surveillances conducted by the Federal Bureau of Investigation is substantially greater than the government stated in its brief (p. 27, n. 10). The figures given in our brief, as shown by the references to the congressional testimony on

Tudge Keith relies (Br. 83) on Rule 16 (a) of the Federal Rules of Criminal Procedure, but that rule governs disclosure only of "relevant" statements. The question here is whether disclosure need be made when a judge finds no "arguable relevance."

which they were based, were to the number of such surveillances in operation on the day on which the testimony was given. The figures were intended to show that the number of such surveillances in the past ten years has diminished. The figures the anici cite, given in correspondence between Assistant Attorney General Mardian and Senator Edward M. Kennedy, refer to the total number of such surveillances in the years involved. That number naturally is larger than the number in use on any particular day.

6. As an alternative ground of affirmance, the defendant-respondents (Br. 148-154), but not Judge Keith, argue that mandamus would not properly lie. The court of appeals correctly rejected this contention (App. 37-39).

The district court's ruling that the surveillance here was unlawful and that the government must disclose the intercepted conversations was not a "final" order reviewable under 28 U.S.C. 1291, and was not within the prescribed classes of interlocutory orders subject to appeal under 28 U.S.C. 1292. Nor could the government have appealed if it had refused to disclose and permitted the indictment to be dismissed. See United States v. Apex Distributing Co., 270 F.2d 747 (C.A. 9). While the recent amendments to the Criminal Appeals Act (18 U.S.C. 3731) authorize appeals by the government from certain orders in criminal cases, those provisions do not apply to cases, such as this one, commenced before the amendments were enacted (see P. L. 91-644, Sec. 16(b), 84 Stat. 1890).

Recognizing that "mandamus may not be substituted for appeal" (App. 37), the court of appeals held that mandamus was appropriate in this "extraordinary" case, because the government contended that the lower court's order was filegal and an abuse of discretion, and because the "[g]reat issues \* \* \* at stake" had "never been decided at the appellate level by any court" (App. 39). The court of appeals did not abuse its discretion in concluding that the writ would lie.

The district court's order requiring that the government disclose telephone conversations intercepted during the course of a national security surveillance was based on its legal ruling that such surveillance is unlawful if there has been no prior judicial approval. The order placed the government in the dilemma of either dropping the prosecution of the serious criminal offense involved here, or revealing sensitive national security information which, it believes, the law does not require it to disclose. The underlying issue of the legality of such surveillance is a recurring question of great importance that should be authoritatively settled as soon as possible. In the instant case "there are extraordinary circum-' stances, [so that] mandamus may be used to review" the disclosure order. Will v. United States, 389 U.S. 90, 108 (Mr. Justice Black, concurring); see also Ex parte United States, 242 U.S. 27; La Buy v. Howes Leather Co., 352 U.S. 249; Schlagenhauf v. Holder, 379 U.S. 104.

#### CONCLUSION

For the reasons stated here and in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case remanded to that court for further proceedings consistent with the opinion of this Court.

ERWIN N. GRISWOLD, Solicitor General.

ROBERT C. MARDIAN,
Assistant Attorney General.

DANIEL J. MCAULIFFE, ROBERT L. KEUCH, GEORGE W. CALHOUN, Attorneys.

FEBRUARY 1972.

#### APPENDIX 1

#### AFFIDAVIT OF ROBERT E. JORDAN III GENERAL COUNSEL OF THE ARMY

- I, ROBERT E: JORDAN, being duly sworn, depose and state:
- 1. I am General Counsel for the Department of the Army. At all times relevant to this affidavit, that is, since the Summer of 1967, I have been serving either as Deputy General Counsel, Acting General Counsel, or General Counsel of the Department of the Army. In those capacities I have served as the principal Secretariat Advisor to the Secretary and Undersecretary of the Army on civil disturbance matters and have been directly and personally involved in Army Civil Disturbance Planning, as well as in all operation involving the commitment of Federal troops to assist state or local authorities.
- 2. Under the plan by which the Departments of Defense and Justice (1) coordinate their preparations for their responses to any serious civil disturbances that may hereafter occur in a city in the United States and (2) to assist the President in responding appropriately and effectively to any request he may receive for Federal military troops to aide in suppressing such a disturbance or to enforce Federal law under 10 U.S.C. 3332 or to protect civil rights pursuant to 10 U.S.C. 3333, the Attorney General has been designated by the President as the Chief Civilian Officer in charge of coordinating all Federal Government activities relating to civil disturbances. The Attorney General is so designated because of his re-

<sup>&</sup>lt;sup>1</sup>This material is contained at pp. 100-102 and 109-115 of Appendix filed with this Court in *Melvin R. Laird*, et al v. Arlo Tatum, et al., No. 71-288, certiorari granted, November 16, 1971.

sponsibilities as Chief Law Enforcement Officer of the Federal Government, and as Chief Legal Advisor to the President on the critically important decisions the President must personally make as to whether and when to permit military forces in response to an ap-

propriate state request.

On the other hand, all essentially military preparations and operations, including especially the employment of military forces at the scene of a disturbance, is the primary responsibility of the Secretary of Defense. In discharging these function, he observes such law enforcement policies as the Attorney General may determine. To the extent practical, such law enforcement policies are formulated during the planning stage so that military commanders can familiarize themselves with them and train their personnel to implement them. This assures that military planning and operations are consistent with Administration policy and the requirements of law.

The responsibilities of the Department of Defense under this plan are carried out principally through the Department of the Army, inasmuch as the Secretary of the Army is assigned primary responsibility for civil disturbance matters, as Executive Agent, subject to the general supervision of the Secretary of Defense. Within the Department of the Army, a Directorate for Civil Disturbance Planning and Operations serves the Secretary and the Army Chief of Staff as the principal military staff agency for such matters.

The Secretary of Defense has the primary responsibility for training, equipping, and designating the forces to be used in controlling civil disturbances. He also retains primary responsibility for preparing operation plans, determining procedures for alerting and moving the forces, and testing command and control arrangements. The Attorney General is consulted on important questions of law and law enforcement poli-

cy arising in connection with these plans and preparations.

When a State Governor anticipates that a request for Federal military assistance will shortly become necessary, he will confer with the Attorney General concerning the facts of the situation, so that the Attorney General can review the legal sufficiency of the impending request. After consultation with Department of Defense officials on the gravity of the situation, the Attorney General will advise the President whether the conditions would warrant honoring a request at that particular time.

When the Governor concludes that a formal request for military assistance is necessary, he will address it directly to the President. At such time, the President must exercise his personal judgment as to whether or not to commit Federal armed forces. The decision may be a difficult one, as it involves a weighing of the apparent need for Federal forces in the circumstances, and the President's responsibility to respond to State requests for such assistance, against the primary responsibility of State and local authorities for maintaining local law and order, and the inadvisability of employing Federal military force for that purpose except in the last resort.

The Attorney General will have furnished the President with an appropriately drawn Proclamation and Executive Order, to be signed by the President in the event that he decides to honor the request. These documents will formalize the decision and state the factual and legal grounds on which it is based.

ROBERT E. JORDAN III General Counsel of the Army

# OFFICE OF THE ATTORNEY GENERAL Washington, D.C. 20530

#### Dear Governor:

At the President's request, I am writing you regarding the legal requirements for the use of Federal Troops in case of severe domestic violence within your state. The requirements are simple. They arise from the Constitution. So the principles will be clearly in mind, I will briefly outline here the basic considerations of Federal law applicable to such a situation.

The underlying constitutional authority is the duty of the United States under Article IV, Sec. 4, to protect each of the states "on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence." This pledge is implemented by Chapter 15 of Title 10, U.S.C. and particularly 10 U.S.C. 331, which derives from an act of Congress passed in 1795. The history of the use of Federal forces at the request of governors in varied circumstances of local violence over more than a century is also instructive.

There are three basic prerequisites to the use of Federal troops in a state in the event of domestic

violence:

(1) That a situation of series "domestic violence" exists within the state. While this conclusion should be supported with a statement of factual details to the extent feasible under the circumstances, there is

no prescribed wording.

(2) That such violence cannot be brought under control by the law enforcement resources available to the governor, including local and State police forces and the National Guard. The judgment required here is that there is a definite need for the assistance of Federal troops, taking into account the remaining

time needed to move them into action at the scene of violence.

(3) That the legislature or the governor requests the President to employ the armed forces to bring the violence under control. The element of request by the governor of a State is essential if the legislature cannot be convened. It may be difficult in the context of urban rioting, such as we have seen this summer, to convene the legislature.

These three elements should be expressed in a written communication to the President, which of course may be a telegram, to support his issuance of a proclamation under 10 U.S.C. 334 and commitment of troops to action. In case of extreme emergency, receipt of a written request will not be a prerequisite to Presidential action. However, since it takes several hours to alert and move Federal troops, the few minutes needed to write and dispatch a telegram are not likely to cause any delay.

Upon receiving the request from a governor, the President, under the terms of the statute and the historic practice, must exercise his own judgment as to whether Federal troops will be sent, and as to such questions as timing, size of the force, and federaliza-

tion of the National Guard.

Preliminary steps, such as alerting the troops, can be taken by the Federal government upon oral communications and prior to the governor's determination that the violence cannot be brought under control without the aid of Federal forces. Even such preliminary steps, however, represent a most serious departure from our traditions of local responsibility for law enforcement. They should not be requested until there is a substantial likelihood that the federal forces will be needed.

. While the formal request must be addressed to the President, all preliminary communications should be with me. When advised by you that serious domestic violence is occurring, I will inform the President and alert the proper military authorities. You can reach me at my office, my home, or through the White House switchboard at any hour.

Enclosed are copies of the relevant constitutional and statutory provisions and a brief summary of past occasions on which a governor has requested Federal military assistance. Your legal counsel, I am sure. keeps you fully advised of requirements of state law as well.

If you have any questions or comments, please let me know.

Sincerely.

Attorney General

Enclosures

#### THE CONSTITUTION

## Article IV. Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence.

## TITLE 10, UNITED STATES CODE Chapter 15

§ 331. Federal aid for State governments.

Whenever there is an insurrection in any State against its government, the President may upon the

request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

# § 334. Proclamation to disperse.

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

#### STATE REQUESTS FOR FEDERAL ASSISTANCE IN SUPPRESSING DOMESTIC VIOLENCE

### A. Chronological List

1838—Buckshot War. The Pennsylvania Governor asked for Federal assistance (based on Const. Art. IV, sec 4) in restoring order when violence resulted from a bitter political contest. President Van Buren refused on the ground that Federal interference is justified only where domestic violence in such that State authorities have proved inadequate.

1842—Dorr Rebellion. Rhode Island Governor King asked for assistance to stop the attempt of Dorr to claim the Governorship. President Tyler replied that the time for Federal interference had not arrived since there was no actual insurrection. Further requests were denied on the ground that the legislature was in session and the Governor therefore was not authorized to apply for aid. The President said he

would issue a proclamation if a lawful request was made, but Dorr disbursed his troops and this was not done.

1856—San Francisco Vigilance Committee. California Governor requested Federal aid in stopping the Committee from usurping the authority of the State. The Attorney General advised President Pierce that the circumstances did not afford sufficient legal justification for Federal assistance since there was no "actual shock of arms" between insurgents and the State, and the State had not exhausted its powers to deal with the situation. (8 Op. A.G. 8) The President took no action.

1873—New Orleans unrest. Lawlessness due to racial problems and also political uncertainty as to proper occupants of political office resulted in violence. Louisiana Governor asked for Federal help. President Grant issued a proclamation ordering the insurgents to disperse. Failure to heed the proclamation and increased disturbance resulted in a further proclamation and dispatch of two regiments.

1876—South Carolina riots. Riots resulted from an altercation between the Ku Klux Klan and Negro state militia. The President issued a proclamation in response to a call for Federal intervention and troops were stationed at 70 places in the State to secure the peace during the election. (This action culminated in enactment of Posse Comitatus Act of 1878).

1877—Railroad Strike riots. Upon request for Federal intervention, President Hayes issued proclamations with respect to West Virginia, Maryland, Pennslyvania and Illinois to restore order. The Ohio Governor asked for and received Federal arms but did not request troops. Indiana asked the President to auth-

orize the commandant at the U.S. arsenal to aid the state. On the ground that the request was incorrectly made, the Governor was informed that Federal troops would be used only to protect U.S. property. Michigan, Wisconsin and California also made requests for help but the situation in those states did not become critical.

1892—Idaho's Coeur d'Alene mining disturbances. During a seven year period, President Harrison, Cleveland and McKinley furnished Federal assistance which was requested by Idaho Governors.

1894—Coxey's Army of unemployed. President Cleveland instructed the army to assist Montana in handling violence of Coxeyite contingent in Montana, at the Governor's request. However, the President did not issue a formal proclamation.

1903—Colorado mining strike disturbance. President Theodore Roosevelt denied assistance to the Colorado Governor who made two requests for "such aid as I, may call for", but promised that the Federal Government would act when a request was made in a manner "contemplated by law", explaining that under H.R. 5297 there must be shown an insurrection against the State and inability of the State to control it.

1907—Nevada mining disturbance. In response to an urgent request from the Governor, President Roosevelt ordered troops to assist. Later, a President's investigating committee found there was no warrant for the assertion that the civil authority of the state had collapsed. After the President threatened withdrawal of the troops, the Governor convened the legislature, which asked that Federal troops remain for a short period until the State Police could be organized and equipped to handle the situation.

1914—Colorado coal strike. At the request of the Governor, President Wilson sent troops to stop rioting, but only after considerable negotiation and exploring of avenues of peaceful resolution by Government representatives failed.

1919—Race riots in Washington, D.C. and Omaha; Gary steel strike. On the theory that the service by the National Guard in the war left the States without adequate protection against internal disorders, the Secretary of War instructed commanders to the departments to respond to state requests for assistance. The use of Federal troops in 1919 was without a proclamation or other formalities.

1921—West Virginia coal mine warfare. President Harding was requested by the Governor to intervene. The President stated that he was not justified in using Federal military forces until he was assured the State had exhausted all its resources. A subsequent outburst of violence resulted in a Proclamation and order to dispatch Federal troops. The troops met no resistance and disarmed the miners.

1932—The Bonus Army. Needy veterans who came to Washington to seek veterans' bonus legislation were housed in tents, shacks, and government buildings which were being demolished. The Treasury Department attempted to repossess a government building in order to continue demolition, resulting in a clash between the veterans and police. The District Commissioners asked the President for assistance and the army moved in, cleared the buildings and destroyed the shacks. No proclamation was issued.

1943—Detroit race riots. The Governor advised that the State was unable to suppress domestic violence, the President issued a proclamation and Federal troops were dispatched.

1967—Detroit riots. The most recent incident, of course, was the dispatch of Federal troops to Detroit on July 24, 1967 at the request of the Governor. President Johnson issued a proclamation and Executive Order pursuant to Chapter 15 of Title 10, U.S. Code.



NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337.

#### SUPREME COURT OF THE UNITED STATES

Syllabus

# UNITED STATES v. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

No. 70-153. Argued February 24, 1972-Decided June 19, 1972

The United States charged three defendants with conspiring to destroy, and one of them with destroying, Government property. In response to the defendants' pretrial motion for disclosure of electronic surveillance information, the Government filed an affidavit of the Attorney General stating that he had approved the wiretaps for the purpose of "gather[ing] intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." On the basis of the affidavit and surveillance logs (filed in a sealed exhibit), the Government claimed that the surveillances, though warrantless, were lawful as a reasonable exercise of presidential power to protect the national security. The District Court, holding the surveillances violative of the Fourth Amendment, issued an order for disclosure of the overheard conversations, which the Court of Appeals upheld. Title III of the Omnibus Crime Control and Safe Streets Act, which authorizes court-approved electronic surveillance for specified crimes, contains a provision in 18 U.S.C. § 2511 (3) that nothing in that law limits the President's constitutional power to protect against the overthrow of the Government or against "any other clear and present danger to the structure or existence of the Government." The Government relies on § 2511 (3) in support of its contention that "in excepting national security surveillances from the Act's warrant requirement, Congress recognized the President's authority to conduct such surveillances without prior judicial approval." Held:

1. Section 2511 (3) is merely a disclaimer of congressional intent to define presidential powers in matters affecting national security,

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and is not a grant of authority to conduct warrantless national security surveillances. Pp. 4-10.

- 2. The Fourth Amendment (which shields private speech from unreasonable surveillance) requires prior judicial approval for the type of domestic security surveillance involved in this case. Pp. 16-23, 25.
- (a) The Government's duty to safeguard domestic security must be weighed against the potential danger that unreasonable surveillances pose to individual privacy and free expression. Pp. 16-17.
- (b) The freedoms of the Fourth Amendment cannot properly be guaranteed if domestic security surveillances are conducted solely within the discretion of the executive branch without the detached judgment of a neutral magistrate. Pp. 18-20.
- (c) Resort to appropriate warrant procedure would not frustrate the legitimate purposes of domestic security searches. Pp. 20-23.

444 F. 2d 651, affirmed.

POWELL, J., delivered the opinion of the Court, in which Douglas, Brennan, Marshall, Stewart, and Blackmun, JJ., joined. Douglas, J., filed a concurring opinion. Burger, C. J., concurred in the result. White, J., filed an opinion concurring in the judgment. Rehnquist, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 70-153

United States, Petitioner,

D.

United States District Court for the Eastern District of Michigan, Southern Division, et al. On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 19, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.

This case arises from a criminal proceeding in the United States District Court for the Eastern District of Michigan, in which the United States charged three defendants with conspiracy to destroy Government property in violation of 18 U. S. C. § 371. One of the

<sup>1</sup> See n. 10, infra.

defendants, Plamondon, was charged with the dynamite bombing of an office of the Central Intelligence Agency in Ann Arbor, Michigan.

During pretrial proceedings, the defendants moved to compel the United States to disclose certain electronic surveillance information and to conduct a hearing to determine whether this information "tainted" the evidence on which the indictment was based or which the Government intended to offer at trial: In response, the Government filed an affidavit of the Attorney General, acknowledging that its agents had overheard conversations in which Plamondon had participated. The affidavit also stated that the Attorney General approved the wiretaps "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." 2 The affidavit, together with the logs of the surveillance, were filed in a sealed exhibit for in camera inspection by the District Court.

<sup>&</sup>lt;sup>2</sup> The Attorney General's affidavit reads as follows:

<sup>&</sup>quot;JOHN N. MITCHELL being duly sworn deposes and says:

<sup>&</sup>quot;1. I am the Attorney General of the United States.

<sup>&</sup>quot;2. This affidavit is submitted in connection with the Government's opposition to the disclosure to the defendant Plamondon of information concerning the overhearing of his conversations which occurred during the course of electronic surveillances which the Government contends were legal.

<sup>&</sup>quot;3. The defendant Plamondon has participated in conversations which were overheard by Government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government. The records of the Department of Justice reflect the installation of these wiretaps had been expressly approved by the Attorney General.

<sup>&</sup>quot;4. Submitted with this affidavit is a sealed exhibit containing the records of the intercepted conversations, a description of the premises that were the subjects of the surveillances, and copies of

On the basis of the Attorney General's affidavit and the sealed exhibit, the Government asserted that the surveillances were lawful, though conducted without prior judicial approval, as a reasonable exercise of the President's power (exercised through the Attorney General) to protect the national security. The District Court held that the surveillance violated the Fourth Amendment, and ordered the Government to make full disclosure to Plamondon of his overheard conversations.

— F. Supp. —

The Government then filed in the Court of Appeals for the Sixth Circuit a petition for a writ of mandamus to set aside the District Court order, which was stayed pending final disposition of the case. After concluding that it had jurisdiction, that court held that the surveillances were unlawful and that the District Court had properly required disclosure of the overheard conversations, 444 F. 2d 651 (1971). We granted certorari, 403 U.S. 930.

the memoranda reflecting the Attorney General's express approval of the installation of the surveillances.

<sup>&</sup>quot;5. I certify that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court in camera. Accordingly, the sealed exhibit referred to herein is being submitted solely for the court's in camera inspection and a copy of the sealed exhibit is not being furnished to the defendants. I would request the court, at the conclusion of its hearing on this matter, to place the sealed exhibit in a sealed envelope and return it to the Department of Justice where it will be retained under seal so that it may be submitted to any appellate court that may review this matter."

ground that the District Court's order was interlocutory and not appealable under 28 U. S. C. § 1291. On this issue, the Court correctly held that it did have jurisdiction, relying upon the All Writs Statute, 28 U. S. C. § 1651, and cases cited in its opinion, 444 F. 2d, at 655-656. No attack was made in this Court as to the appropriateness of the writ of mandamus procedure.

T

Title III of the Omnibus Crime Control and Safe Streets Act, 18 U. S. C. §§ 2510-2520, authorizes the use of electronic surveillance for classes of crimes carefully specified in 18 U. S. C. § 2516. Such surveillance is subject to prior court order. Section 2518 sets forth the detailed and particularized application necessary to obtain such an order as well as carefully circumscribed conditions for its use. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in Berger v. New York, 388 U. S. 41 (1967), and Katz v. United States, 389 U. S. 347 (1967).

Together with the elaborate surveillance requirements in Title III, there is the following proviso, 18 U. S. C. § 2511 (3):

"Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U. S. C. § 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Gov-

ernment. The centents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powersmay be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." (Emphasis supplied.)

The Government relies on § 2511 (3). It argues that in excepting national security surveillances from the Act's warrant requirement Congress recognized the President's authority to conduct such surveillances without prior judicial approval." Govt. Brief, pp. 3, 28. The section thus is viewed as a recognition or affirmance of a constitutional authority in the President to conduct warrantless domestic security surveillance such as that involved in this case.

We think the language of § 2511 (3), as well as the legislative history of the statute, refutes this interpreta-

tion. The relevant language is that:

"Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect ..."

against the dangers specified. At most, this is an implicit recognition that the President does have certain powers in the specified areas. Few would doubt this, as the section refers among other things to protection "against actual or potential attack or other hostile acts of a foreign power." But so far as the use of the President's electronic surveillance power is concerned, the language is essentially neutral.

Section 2511 (3) certainly confers no power, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted. to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left

presidential powers where it found them. This view is reinforced by the general context of Title III. Section 2511 (1) broadly prohibits the use of electronic surveillance "except as otherwise specifically provided in this chapter." Subsection (2) thereof contains four specific exceptions. In each of the specified exceptions, the statutory language is as follows:

"It shall not be unlawful . . . to intercept" the particular type of communication described.

The language of subsection (3), here involved, is to be contrasted with the language of the exceptions set forth in the preceding subsection. Rather than stating that warrantless presidential uses of electronic surveillance "shall not be unlawful" and thus employing the standard language of exception, subsection (3) merely disclaims any intention to "limit the constitutional power of the President."

The express grant of authority to conduct surveillances is found in § 2516, which authorizes the Attorney General to make application to a federal judge when surveillance may provide evidence of certain offenses. These offenses are described with meticulous care and specificity.

Where the Act authorizes surveillance, the procedure to be followed is specified in §.2518. Subsection (1) thereof requires application to a judge of competent jurisdiction for a prior order of approval, and states in detail the information required in such application.

<sup>&</sup>lt;sup>4</sup> These exceptions relate to certain activities of communication common carriers and the Federal Communications Commission, and to specified situations where a party to the communication has consented to the interception.

<sup>&</sup>lt;sup>5</sup> 18 U. S. C. § 2518, subsection (1) reads as follows:

<sup>&</sup>quot;§ 2518. Procedure for interception of wire or oral communications (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writ-

Subsection (3) prescribes the necessary elements of probable cause which the judge must find before issuing an order authorizing an interception. Subsection (4) sets forth the required contents of such an order. Subsection (5) sets strict time limits on an order. Pro-

ing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application:

- "(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be interested. (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted:
- "(e) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous:
- "(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter:
- "(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and
- . "(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results."

vision is made in subsection (7) for "an emergency situation" found to exist by the Attorney General (or by the principal prosecuting attorney of a State) "with respect to conspiratorial activities threatening the national security interest." In such a situation, emergency surveillance may be conducted "if an application for an order approving the interception is made . . . within 48 hours." If such an order is not obtained, or the application therefor is denied, the interception is deemed to be a violation of the Act.

. In view of these and other interrelated provisions delineating permissible interceptions of particular criminal activity upon carefully specified conditions, it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act. We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillances.

The legislative history of § 2511 (3) supports the interpretation. Most relevant is the colloquy between Senators Hart, Holland, and McClellan on the Senate floor:

"Mr. Holland. . . . The section [2511(3)] from which the Senator [Hart] has read does not affirmatively give any power. . . . We are not affirmatively

The final sentence of § 2511 (3) states that the contents of an interception "by authority of the President in the exercise of the foregoing powers may be received in evidence . . . only where such interception was, reasonable. . . ." This sentence seems intended to assure that when the President conducts lawful surveillancepursuant to whatever power he may possess—the evidence is admissible.

conferring any power upon the President. We are simply saying that nothing herein shall limit such power as the President has under the Constitution. . . . We certainly do not grant him a thing.

"There is nothing affirmative in this statement.

"Mr. McClellan. Mr. President, we make it understood that we are not trying to take anything away from him.

"Mr. Holland. The Senator is correct.

"Mr. Hart. Mr. President, there is no intention here to expand by this language a constitutional power. Clearly we could not do so.

"Mr. McClellan. Even though we intended, we could not do so.

"Mr. Hart. . . . However, we are agreed that this language should not be regarded as intending to grant any authority, including authority to put a bug on, that the President does not have now.

"In addition, Mr. President, as I think our exchange makes clear, nothing in Section 2511(3) even attempts to define the limits of the President's national security power under present law, which I have always found extremely vague. . . . Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by title III. (Emphasis supplied.)

<sup>&</sup>lt;sup>7</sup> Cong. Rec. Vol. 114, pt. 11, p. 14751, May 23, 1968. Senator McClellan was the sponsor of the bill. The above exchange constitutes the only time that § 2511 (3) was expressly debated on the Senate or House floor. The Report of the Senate Judiciary Committee is not so explicit as the exchange on the floor, but it appears to recognize that under § 2511 (3) the national security power of the President-whatever it may be-"is not to be deemed disturbed." S. Rep. No. 1097, 90th Cong., 2d Sess., 94 (1968). See also The "National Security Wiretap": Presidential Prerogative or Judicial Responsibility where the author concludes that in § 2511 (3) "Congress took what amounted to a position of neutral noninter-

One could hardly except a clearer expression of congressional neutrality. The debate above explicitly indicates that nothing in § 2511 (3) was intended to expand or to contract or to define whatever presidential surveillance powers existed in matters affecting the national security. If we could accept the Government's characterization of § 2511 (3) as a congressionally prescribed exception to the general requirement of a warrant, it would be necessary to consider the question of whether the surveillance in this case came within the exception and, if so, whether the statutory exception was itself constitutionally valid. But viewing § 2511 (3) as a congressional disclaimer and expression of neutrality. we hold that the statute is not the measure of the executive authority asserted in this case. Rather, we must look to the constitutional powers of the President.

### II

It is important at the outset to emphasize the limited nature of the question before the Court. This case raises no constitutional challenge to electronic surveillance as specifically authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Nor is there any question or doubt as to the necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest. Katz v. United States, 389 U. S. 347 (1967); Berger v. New York, 388 U. S. 41 (1967). Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country. The Attorney General's affidavit in this case states that the surveillances were "deemed necessary to protect the nation from attempts

ference on the question of the constitutionality of warrantless national security wiretaps authorized by the President." 45 S. Cal. L. Rev. — (1972).

of domestic organizations to attack and subvert the existing structure of Government" (emphasis supplied). There is no evidence of any involvement, directly or indirectly of a foreign power.

Our present inquiry, though important, is therefore a narrow one. It addresses a question left open by Katz, supra, p. 358, n. 23:

"Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security..."

The determination of this question requires the essential Fourth Amendment inquiry into the "reasonableness" of the search and seizure in question, and the way in which that "reasonableness" derives content and meaning through reference to the warrant clause. Coolidge v. New Hampshire, 403 U. S. 443, 473-484 (1971).

<sup>&</sup>lt;sup>8</sup> Section 2511 (3) refers to "the constitutional power of the President" in two types of situations: (i) where necessary to protect against attack, other hostile acts or intelligence activities of a "foreign power"; or (ii) where necessary to protect against the overthrow of the Government or other clear and present danger to the structure or existence of the Government. Although both of the specified situations are sometimes referred to as "national security" threats, the term "national security" is used only in the first sentence of § 2511 (3) with respect to the activities of foreign powers. This case involves only the second sentence of § 2511 (3), with the threat emanating-according to the Attorney General's affidavit-from "domestic organizations." Although we attempt no precise definition, we use the term "domestic organization" in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies... No doubt there are cases where it will be difficult to distinguish between "domestic" and "foreign" unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case:

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, "to preserve, protect, and defend the Constitution of the United States." Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government. The use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946.

<sup>\*</sup> Enactment of Title III reflects congressional recognition of the importance of such surveillance in combatting various types of crime. Frank S. Hogan, District Attorney for New York County for over 25 years, described telephonic interception, pursuant to court order, as "the single most valuable weapon in law enforcement's fight against organized crime." Cong. Rec. Vol. 117, S 6476, May 10, 1971. The "Crime" Commission appointed by President Johnson noted that "the great majority of law enforcement officials believe that the evidence necessary to bring criminal sanctions to bear consistently on the higher echelons of organized crime will not be obtained without the aid of electronic surveillance techniques. They maintain these techniques are indispensable to develop adequate strategic intelligence concerning organized crime, to set up specific ingestigations, to develop witnesses, to corroborate their testimony, and to serve as substitutes for them—each a necessary step in the evidencegathering process in organized crime investigations and prosecutions." Report by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society. p. 201 (1967).

Truman of the necessity of using wiretaps "in cases vitally affecting the domestic security." In May 1940 President Roosevelt had authorized Attorney General Jackson to utilize wiretapping in matters "involving the defense of the nation," but it is questionable whether this language was meant to apply to solely domestic subversion.

Herbert Brownell, Attorney General under President Eisenhower, urged the use of electronic surveillance both in internal and international security matters on the grounds that those acting against the Government

The success of their plans frequently rests upon piecing together shreds of information received from many sources and many nests. The participants in the conspiracy are often dispersed and stationed in various strategic positions in government and industry throughout the country."

Though the Government and respondents debate their seriousness and magnitude, threats and acts of sabotage against the Government exist in sufficent number to justify investigative powers with respect to them.<sup>12</sup> The covertness and complexity of potential unlawful conduct against the Government and the necessary dependency of many conspirators upon the telephone make electronic surveillance an effective investigatory instrument

The nature and extent of wiretapping apparently varied under different administrations and Attorneys General, but except for the sharp curtailment under Attorney General Ramsey Clark in the latter years of the Johnson administration, electronic surveillance has been used both against organized crime and in domestic security cases at least since the 1946 memorandum from Clark to Truman. Govt. Brief, pp. 16–18; Resp. Brief, pp. 51–56; Cong. Rec. Vol. 117, S 6476–6477, May 10, 1971.

<sup>11</sup> Brownell, The Public Security and Wire Tapping, 39 Cornell L. Q. 195, 202 (1954). See also Rogers, The Case For Wire Tapping, 63 Yale L. J. 792 (1954).

<sup>12</sup> The Government asserts that there were 1,562 bombing incidents in the United States from January 1, 1971, to July 1, 1971, most of which involved Government related facilities. Respondents dispute these statistics as incorporating many frivolous incidents as well as bombings against nongovernmental facilities. The precise level of this activity, however, is not relevant to the disposition of this case. Govt. Brief, p. 18; Resp. Brief, p. 26–29; Govt. Reply Brief, p. 13.

in certain circumstances. The marked acceleration in technological developments and sophistication in their use have resulted in new techniques for the planning, commission and concealment of criminal activities. It would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of those very techniques which are employed against the Government and its law abiding citizens.

It has been said that "the most basic function of any government is to provide for the security of the individual and of his property." Miranda v. Arizona, 384 U. S. 436, 539 (1966) (White, J., dissenting). And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered. As Chief Justice Hughes reminded us in Cox v. New Hampshire, 312 U. S. 569, 574 (1940):

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens.<sup>13</sup> We

<sup>&</sup>lt;sup>13</sup> Professor Alan Westin has written on the likely course of future conflict between the value of privacy and the "new technology" of law enforcement. Much of the book details techniques of physical and electronic surveillance and such possible threats to personal privacy as psychological and personality testing and electronic information storage and retrieval. Not all of the contemporary threats to privacy emanate directly from the pressures of crime control. A. Westin, Privacy and Freedom (1967).

Though physical entry of the home is the chief evilagainst which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance. Katz v. United States, supra; Berger v. New York, supra; Silverman v. United States, 365 U. S. 505 (1961). Our decision in Katz refused to lock the Fourth Amendment into instances of actual physical trespass. Rather, the Amendment governs "not only the seizure of tangible items, but extends as well to the recording of oral statements 'without any technical trespass under ... local property law." Katz, supra, at 353. That decision implicitly recognized that the broad and unsuspected governmental incursions into conversational privacy which electronic surmillance entails 14 necessitate the application of Fourth Amendment safeguards.

National security cases, moreover, often reflect a corrvergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure. power," Marcus v. Search Warrant, 367 U. S. 717, 724 (1961). History abundantly documents the tendency of Government-however benevolent and benign its motives—to view with suspicion those who most rervently dispute its policies. Fourth Amendment protections be-

<sup>14</sup> Though the total number of intercepts authorized by state and federal judges pursuant to Tit. III of the 1968 Omnibus Crime Control and Safe Streets Act was 597 in 1970, each surveillance may involve interception of hundreds of different conversations. The average intercept in 1970 involved 44 people and 655 conversations, of which 295 or 45% were incriminating. Cong. Rec. Vol. 117, S 6477, May 10, 1971.

come the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. Senator Hart addressed this dilemma in the floor debate on § 2511 (3):

"As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government." 15.

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

III

As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression. If the legitimate need of Government to safeguard domestic security requires the use of

<sup>&</sup>lt;sup>15</sup> Cong. Rec. Vol. 114, pt. 11, p. 14750, May 23, 1968. The subsequent assurances, quoted in part I of the opinion, that § 2511 (3) implied no statutory grant, contraction, or definition of presidential power eased the Senator's misgivings.

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electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.

Though the Fourth Amendment speaks broadly of "unreasonable searches and seizures," the definition of "reasonableness" turns, at least in part, on the more specific commands of the warrant clause. Some have argued that "the relevant test is not whether it was reasonable to procure a search warrant, but whether the search was reasonable," United States v. Rabinowitz, 339 U. S. 56, 66 (1950). This view, however, overlooks the second clause of the Amendment. The warrant clause of the Fourth Amendment is not dead language. Rather it has been

"a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in the courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly cover-

U. S. 752 (1969), the Court considered the Government's contention that the search be judged on a general "reasonableness" standard without reference to the warrant clause. The Court concluded that argument was "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point." Chimel, supra, at 764-765.

zealous executive officers' who are a part of any system of law enforcement." Coolidge v. New Hampshire, supra, at 491.

See also United States v. Rabinowitz, 339 U. S. 57, 68 (1950) (Frankfurter, J., dissenting); Davis v. United States, 328 U. S. 582, 604 (Frankfurter, J., dissenting).

Over two centuries ago, Lord Mansfield held that common law principles prohibited warrants that ordered the arrest of unnamed individuals whom the officer might conclude were guilty of seditious libel. "It is not fit," said Mansfield, "that the receiving or judging of the information ought to be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." Leach v. Three of the King's Messengers, How. St. Tr. 1001, 1027 (1765).

Lord Mansfield's formulation touches the very heart of the Fourth Amendment directive: that where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. Inherent in the concept of a warrant is its issuance by a "neutral and detached magistrate." Coolidge v. New Hampshire, supra, at 453; Katz & United States, supra, at 356. The further requirement of "probable cause" instructs the magistrate that baseless searches shall not proceed.

These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the executive branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate and to prose-

cute. Katz v. United States, supra, at 359-360 (Douglas, J., concurring). But those harged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.<sup>17</sup>

It may well be that, in the instant case, the Government's surveillance of Plamondon's conversations was a reasonable one which readily would have gained prior judicial approval. But this Court "has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." Katz, supra, at 356-357. The Fourth Amendment contemplates a prior judicial judgment,18 not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government. John M. Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A. B. A. J. 943-944 (1963). The independent check upon executive discretion is not satisfied, as the Government argues, by "extremely limited" post-surveillance judicial review.19

<sup>&</sup>lt;sup>17</sup> Lasson, The History and Development of the Fourth Amendment to the United States Constitution, 79-105 (1937).

<sup>&</sup>lt;sup>18</sup> We use the word "judicial" to connote the traditional Fourth Amendment requirement of a neutral and detached magistrate.

<sup>&</sup>lt;sup>19</sup> The Government argues that domestic security wiretaps should be upheld by courts in post surveillance review "unless it appears that the Attorney General's determination that the proposed sur-

Indeed, post-surveillance review would never reach the surveillances which failed to result in prosecutions. Prior review by a neutral and detached magistrate is the time tested means of effectuating Fourth Amendment rights. Beck v. Ohio, 379 U. S. 89, 96 (1964).

It is true that there have been some exceptions to the warrant requirement. Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1 (1968); McDonald v. United States, 335 U.S. 451 (1948); Carroll v. United States, 267 U.S. 132 (1925). But those exceptions are few in number and carefully delineated, Katz, supra, at 357; in general they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure," Terry v. Ohio, supra, at 20; Chimel v. California, supra, at 762.

The Government argues that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. It is urged that the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security. We are told further that these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions. It is said that this type of surveillance should not be subject to traditional warrant requirements which were

veillance relates to a national security matter is arbitrary and capricious, i. e., that it constitutes a clear abuse of the broad discretion that the Attorney General has to obtain all information that will be helpful to the President in protecting the Government . . " against the various unlawful acts in § 2511 (3). Govt. Brief, p. 22.

established to govern investigation of criminal activity, not on-going intelligence gathering. Govt. Brief, pp. 15-16, 23-24. Govt. Reply Brief, pp. 2-3.

The Government further insists that courts "as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security." These security problems, the Government contends, involve "a large number of complex and subtle factors" beyond the competence of courts to evaluate. Govt. Reply Brief, p. 4.

As a final reason for exemption from a warrant requirement, the Government believes that disclosure to a magistrate of all or even a significant portion of the information involved in domestic security surveillances "would create serious potential dangers to the national security and to the lives of informants and agents... Secrecy is the essential ingredient in intelligence gathering; requiring prior judicial authorization would create a greater 'danger of leaks..., because in addition to the judge, you have the clerk, the stenographer and some other official like a law assistant or bailiff who may be apprised of the nature' of the surveillance." Govt. Brief, pp. 24–25.

These contentions in behalf of a complete exemption from the warrant requirement, when urged on behalf of the President and the national security in its domestic implications, merit the most careful consideration. We certainly do not reject them lightly, especially at a time of worldwide ferment and when civil disorders in this country are more prevalent than in the less turbulent periods of our history. There is, no doubt, pragmatic force to the Government's position.

But we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete

exemption of domestic security surveillance from prior judicial scrutiny. Official surveillance, whether its purpose be criminal investigation or on-going intelligence gathering, risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent. We recognize, as we have before, the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment. In this case we hold that this requires an appropriate prior warrant procedure.

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of ordinary crime. If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering. The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases. Title III of the Omnibus Crime Control and Safe Streets Act

already has imposed this responsibility on the judiciary in connection with such crimes as espionage, sabotage and treason, § 2516 (1)(a)(c), each of which may involve domestic as well as foreign security threats. Moreover, a warrant application involves no public or adversary proceedings: it is an ex parte request before a magistrate or judge. Whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the Government itself to provide the necessary clerical assistance.

'Thus, we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values. Nor do we think the Government's domestic surveillance powers will be impaired to any significant degree. A prior warrant establishes presumptive validity of the surveillance and will minimize the burden of justification in post-surveillance judicial review. By no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.

### IV

We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.20 Nor-

<sup>20</sup> See n. 8, supra. For the view that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved, see United States v. Smith,

does our decision rest on the language of § 2511 (3) or any other section of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. That Act does not attempt to define or delineate the powers of the President to meet domestic threats to the national security.

Moreover, we do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

Given these potential distinctions between Title III criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental in-

<sup>—</sup> F. Supp. — (1971); and American Bar Association Criminal Justice Project, Standards Relating to Electronic Surveillance, Feb. 1971, pp. 11, 120, 121. See also *United States* v. Clay, 430 F. 2d 165 (1970).

terest to be enforced and the nature of citizen rights deserving protection. As the Court said in Camara v. Municipal Court, 387 U.S. 523, 534-535 (1967):

"In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness . . . In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of law enforcement."

It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of § 2518 but should allege other circumstances more appropriate to domestic security cases; that the request for prior court authorization could; in sensitive cases, be made to any member of a specially designated court (e. g., the District Court or Court of Appeals for the District of Columbia); and that the time and reporting requirements need not be so strict as those in § 2518.

The above paragraph does not, of course, attempt to guide the congressional judgment but rather to delineate the present scope of our own opinion. We do not attempt to detail the precise standards for domestic security warrants any more than our decision in Katz sought to set the refined requirements for the specified criminal surveillances which now constitute Title III. We do hold, however, that prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe.

V

As the surveillance of Plamondon's conversations was unlawful, because conducted without prior judicial approval, the courts below correctly held that Alderman v. United States, 394 U. S. 168 (1969), is controlling and that it requires disclosure to the accused of his own impermissibly intercepted conversations. As stated in Alderman, "the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect." 394 U. S. 185.21

The judgment of the Court of Appeals is hereby

Affirmed.

THE CHIEF JUSTICE concurs in the result.

Mr. Justice Rehnquist took no part in the consideration or decision of this case.

<sup>&</sup>lt;sup>21</sup> We think it unnecessary at this time and on the facts of this case to consider the arguments advanced by the Government for a re-examination of the basis and scope of the Court's decision in Alderman.

# SUPREME COURT OF THE UNITED STATES

No. 70-153

· United States, Petitioner,

"

United States District Court for the Eastern District of Michigan, Southern Division, et al. On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 19, 1972]

Mr. JUSTICE DOUGLAS, concurring.

While I join in the opinion of the Court, I add these words in support of it.

This is an important phase in the campaign of the police and intelligence agencies to obtain exemptions from the Warrant Clause of the Fourth Amendment. For, due to the clandestine nature of electronic eavesdropping, the need is acute for placing on the Government the heavy burden to show that "exigencies of the situation [make its] course imperative." Other abuses such as the search incident to arrest, have been partly deterred by the threat of damage actions against offending officers, the risk of adverse publicity, or the possibility of reform through the political process. These latter safeguards, however, are ineffective against lawless wiretapping and "bugging" of which their victims are totally unaware. Moreover, even the risk of exclusion of tainted evidence would here appear to be

<sup>2</sup> See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388.

<sup>&</sup>lt;sup>1</sup> Coolidge v. New Hampshire, 403 U. S. 443, 455; McDonald v. United States, 335 U. S. 451, 456; Chimel v. California, 395 U. S. 756; United States v. Jeffers, 342 U. S. 48, 51.

of negligible deterrent value masmuch as the United States frankly concedes that the primary purpose of these searches is to fortify its intelligence collage rather than to accumulate evidence to support indictments and convictions. If the Warrant Clause were held inapplicable here, then the federal intelligence machine would literally enjoy unchecked discretion.

Here federal agents wish to rummage for months on end through every conversation, no matter how intimate or personal, carried over selected telephone lines simply to seize those few utterances which may add to their sense of the pulse of a domestic underground.

We are told that one national security wiretap lasted for 14 months and monitored over 900 conversations. Senator Edward Kennedy found recently that "warrantless devices accounted for an average of 78 to 209 days of listening per device, as compared with a 13-day per device average for those devices installed under court order." He concluded that the Government's revelations posed "the frightening possibility that the conversations of untold thousands of citizens of this country are being monitored on secret devices which no judge has authorized and which may remain in operation for months and perhaps years at a time." Leven

<sup>&</sup>lt;sup>3</sup> Letter from Senator Edward Kennedy to Members of the Subcommittee on Administrative Procedure and Practice of the Senate
Judiciary Committee, Dec. 17, 1971, p. 2. Senator Kennedy included
in his letter a chart comparing court-ordered and department-ordered
wiretapping and bugging by federal agencies. This chart is reproduced in the Appendix to this opinion. For a statistical breakdown
by duration, location, and implementing agency, of the 1,042 wiretap orders issued in 1971 by state and federal judges, see Administrative Office of the United States Courts, Report on Applications
for Orders Authorizing or Approving the Interception of Wire or
Oral Communications (1972); The Washington Post, May 14, 1972,
at A29, col. 8.

<sup>&</sup>lt;sup>4</sup> Kennedy, op. cit., 2-3. See also H. Schwartz, A Report on the Costs and Benefits of Electronic Surveillance (1971); Schwartz, The

the most innocent and random caller who uses or telephones into a tapped line can become a flagged number in the Government's data bank. See *Laird* v. *Tatum*, 1971 Term, No. 71–288.

Such gross invasions of privacy epitomize the very evil to which the Warrant Clause was directed. This Court has been the unfortunate witness of the hazards of police intrusions which did not receive prior sanction by independent magistrates. For example, in Weeks v. United States, supra; Mapp v. Ohio, 367 U. S. 643; and Chimel v. California, supra, entire homes were ransacked pursuant to warrantless searches. Indeed, in Kremen v. United States, 353 U.S. 346, the entire contents of a cabin, totalling more than 800 items (such as "1 Dish Rag") 5 were seized incident to an arrest of its occupant and were taken to San Francisco for study by FBI agents. In a similar case, Von Cleef v. New Jersey, 395 U.S. 814, police, without a warrant, searched an arrestee's house for three hours, eventually seizing "several thousand articles, including books, magazines, catalogues, mailing lists, private correspondence, (both open and unopened), photographs, drawings, and film." Id., 815. In Silverthorne Lumber Co. v. United States, 251 U. S. 385, federal agents "without a shadow of authority" raided the offices of one of the petitioners (the proprietors of which had earlier been jailed) and "made a clean sweep of all the books, papers, and documents found there." Justice Holmes, for the Court, termed this tactic an "outrage." Id., 385, 390, 391. In Stanford v. Texas, 379 U.S. 476, state police seized more than 2,000 items of literature, including the writings of Mr. Justice Black, pursuant to a general search warrant issued to inspect an alleged subversive's home.

Legitimation of Electronic Eavesdropping: The Politics of "Law and Order," 67 Mich. L. Rev. 455 (1969).

<sup>&</sup>lt;sup>5</sup> For a complete itemization of the objects seized, see the Appendix to Kremen v. United States, 353 U. S. 346, 349.

## UNITED STATES v. UNITED STATES DISTRICT COURT

That "domestic security" is said to be involved here does not draw this case outside the mainstream of Fourth Amendment law. Rather, the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of that prohibition. For it was such excesses as the use of general warrants and the writs of assistance that led to the ratification of the Fourth Amendment. In Entick v. Carrington, 19 How. St. Tr. 1029, decided in 1765, one finds a striking parallel to the executive warrants utilized here. The Secretary of State had issued general executive warrants to his messengers authorizing them to roam about and to seize libel and libellants of the sovereign. Entick, a critic of the Crown, was the victim of one such general search during which his seditious publications were impounded. He brought a successful damage action for trespass against the messengers. The verdict was sustained on appeal. Lord Camden wrote that if such sweeping tactics were validated then "the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspect; of a messenger, whenever the secretary of state shall link fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." Id., 1063. In a related and similar proceeding, Wilkes v. Wood, 9 How. St. Tr. 1153, 1167, a false imprisonment suit, the same judge who presided ever Entick's appeal held for another victim of the same despotic practice, saying "to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition. . . " As early as Boyd v. United States, 116 U.S. 616, 626, and as recently as Stanford v. Texas, supra, at 485-486; Berger v. New York, 388 U.S. 41, 50; and Coolidge v. New Hampshire, supra, at 455, n. 9, the tyrannical invasions described and assailed in Entick and Wilkes.

practices which also were endured by the colonists," have been recognized as the primary abuses which ensured the .Warrant Clause a prominent place in our Bill of Rights. See J. Landynski, Search and Seizure and the Supreme Court 28-48 (1966). N. Lasson, The History And Development Of The Fourth Amendment To The United States Constitution 43-78 (1937); Note, Warrantless Searches In Light of Chimel: A Return To The Original Understanding, 11 Ariz. L. Rev. 455, 460-476 (1969).

As illustrated by a flood of cases before us this Term, e. g., Laird v. Tatum, No. 71-288: Gelbard v. United States, No. 71-110; United States v. Egan, No. 71-263; United States v. Caldwell, No. 70-57; United States v. Gravel, No. 71-1026; Kleindienst v. Mandel, No. 71-16;

e "On this side of the Atlantic, the validity of general search warfants centered around the writs of assistance which were used by customs officers for the detection of smuggled goods." N. Lasson, The History And Development Of The Fourth Amendment To The United States Constitution 51 (1937). In February 1761, all writs expired six months after the death of George II and Boston merchants petitioned the Superior Court in opposition to the granting of any new writs. The merchants were represented by James Otis, Jr., who later became a leader in the movement for independence.

"Otis completely electrified the large audience in the court room with his denunciation of England's whole policy toward the Colonies and with his argument against general warrants. John Adams, then a young man less than twenty-six years of age and not yet admitted to the bar, was a spectator, and many years later described the scene in these oftquoted words: 'I do say in the most solemn manner, that Mr. Otis's oration against the Writs of Assistance breathed into this nation the breath of life.' He 'was a flame of fire! Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free." N. Lasson, supra, 58-59.

we are currently in the throes of another-national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era. Those who register dissent or who petition their governments for redress are subjected to scrutiny by grand juries, by the FBI, or even by the military. Their associates are interrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers. Their pa-

See Donnor & Cerruti, The Grand Jury Network: How the Nixon Administration Has Secretly Perverted A Traditional Safeguard Of Individual Rights, 214 The Nation 5 (1972). See also United States v. Caldwell, 1971 Term. No. 70-57; United States v. Gravel, 1971 Term. No. 71-1026; Parnas v. United States, and United States v. Egan, 1971 Term, Nos. 71-110 and 71-263. And see N. Y. Times, July 15, 1971, at 6, col. 1 (grand jury investigation of N. Y. Times staff who published the Pentagon Papers).

<sup>\*</sup> E. g., N. Y. Times, April 12, 1970, at 1, col. 1 ("U. S. To Tighten Surveillance of Radicals"); N. Y. Times, Dec. 14, 1969, at 1, col. 1 ("F. B. I.'s Informants and Bugs Collect Data On Black Panthers"); The Washington Post, May 12, 1972, at D21, col. 5 ("When the FBI Calls, Everybody Talks"); The Washington Post, May 16, 1972, at B15, col. 5 ("Black Activists Are FBI Targets"); The Washington Post, May 17, 1972, at B13, col. 5 ("Bedroom Peeking Sharpens FBI Files"). And, concerning an FBI investigation of Daniel Schorr, a television correspondent critical of the Government, see N. Y. Times, Nov. 11, 1971, at 95, col. 4; and N. Y. Times, Nov. 12, 1971, at 13, col. 1. For the wiretapping and bugging of Dr. Martin Luther King by the FBI, See V. Navesky, Kennedy Justice 135-155 (1971). For the wiretapping of Mrs. Eleanor Roosevelt and John L. Lewis by the FBI see Theoharis & Meyer, The "National Security" Justification For Electronic Eavesdropping: An Elusive Exception, 14 Wayne L. Rev. 749, 760-761 (1968).

Data Banks, Computers and the Bill of Rights, Hearings before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 92d Cong., 1st Sess. (1971); N. Y. Times, Feb. 29, 1972, at 1, col. 4.

out the twentieth century. They were deployed to combat what were perceived to be an internal threat from radicals during the

triotism and loyalty are questioned.11 Senator Sam Ervin, who has chaired hearings on military surveillance of civilian dissidents, warns that "it is not an exaggeration to talk

early 1920's. When fears began to focus on Communism, groups thought to have some connection with the Communist Party were heavily infiltrated. Infiltration of the Party itself was so intense that one former FBI agent estimated a ratio of one informant for every 5.7 members in 1962. More recently, attention has shifted to militant antiwar and civil rights groups. In part because of support for such groups among university students throughout the country, informers seem to have become ubiquitous on campus. Some insight into the scope of the current use of informers was provided by the Media Papers, FBI documents stolen in early 1971 from a Bureau office in Media, Pennsylvania. The papers disclose FBI attempts to infiltrate a conference of war resisters at Haverford College in August 1969, and a convention of the National Association of Black Students in June 1970. They also reveal FBI endeavors 'to recruit informers, ranging-from bill collectors to apartment janitors, in an effort to develop constant surveillance in black communities and New Left organizations' [N. Y. Times, April 8, 1971, at 22, col. 1]. In Philadelphia's black community, for instance, a whole range of buildings 'including offices of the Congress of Racial Equality, the Southern Christian Leadership Conference [and] the Black Coalition' [ibid.] was singled out for surveillance by building employees and other similar informers working for the . FBI." Note, Developments In The Law-The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1272-1273 (1972). For accounts of the impersonation of journalists by police. FBI agents and soldiers in order to gain the confidences of dissidents. see Press Freedoms Under Pressure, Report of the Twentieth Century Fund Task Force on the Government and the Press 29-34, 86-97 (1972). For the revelation of Army infiltration of political organizations and spying on Senators, Governors and Congressmen, see Federal Data Banks, Computers and the Bill of Rights, Hearings before the Subcom. on Constitutional Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1971) (discussed in my dissent from the denial of certiorari in Williamson v. United States, 405 U.S. —). Among the Media Papers was the suggestion by the F. B. I. that investigation of dissidents be stepped up in order to "enhance the paranoia endemic in these circles and [to] further serve to get the point across that there is an FBI agent behind every mailbox." N. Y. Times March 25, 1971, at 33, col. 1. 11 E. g., N. Y. Times, Feb. 8, 1972, at 1, col. 8 (Senate peace

in terms of hundreds of thousands of . . . dossiers." 12 Senator Kennedy, as mentioned supra, found "the frightening possibility that the conversations of untold thousands are being monitored on secret devices," More than our privacy is implicated. Also at stake is the reach of the Government's power to intimidate its critics.

When the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court's long commitment to the preservation of the Bill of Rights from the corrosive environment of precisely such expedi-As Justice Brandeis said, concurring in Whitney v. California, "those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." Chief Justice Warren put it this way in United States v. Robel, 389 U.S. 258, 264: "[T]he concept of 'national defense' cannot be deemed an end in itself, justifying any . . . power designed to protect such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideas which set this nation apart. . . . It would be indeed ironic if, in the name of national defense, we would sanction the subversion of . . . those

advocates said, by presidential adviser, to be aiding and abetting the enemy).

<sup>12</sup> Amicus curiae brief submitted by Senator Sam Ervin in Laird v. Tatum, 1971 Term, No. 71-288, at 8.

<sup>13</sup> E. g., New York Times Co. v. United States, 403 U. S. 713;4. Powell v. McCormick, 395 U. S. 486; United States v. Robel, 389 U. S. 258, 264; Aptheker v. Secretary of State, 378 U. S. 500; Baggett, v. Bullitt, 377 U.S. 372; Youngstown Sheet & Tube Co. v. Sawyer, 343 . U. S. 579; Duncan v. Kahnamoku, 327 U. S. 304; White v. Steer, 327 U. S. 304; De Jonge v. Oregon, 299 U. S. 353, 365; Ex parte Milligan, 4 Wall. 2; Mitchell v. Harmony, 13 How. 115. Note, The "National Security Wiretap": Presidential Prerogative or Judicial Responsibility, 45 So. Cal. L. Rev. 888, 907-912 (1972).

liberties . . . which make the defense of the Nation worthwhile.

The Warrant Clause has stood as a barrier against intrusions by officialdom into the privacies of life. if that barrier were lowered now to permit suspected subversives' most intimate conversations to be pillaged then why could not their abodes or mail be secretly searched by the same authority? To defeat so terrifying a claim of inherent power we need only stand by the enduring values served by the Fourth Amendment. As we stated last Term in Coolidge v. New Hampshire, 403 U.S. 443, 455: "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won . . . a right of personal security against arbitrary intrusions . . . . If times have changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." have as much or more to fear from the erosion of our sense of privacy and independence by the omnipresent electronic ear of the Government as we do from the likelihood that fomenters of domestic upheaval will modify our form of governing.14

<sup>14</sup> I continue in my belief that it would be extremely difficult to write a search warrant specifically naming the particular conversations to be seized and therefore any such attempt would amount to a general warrant, the very abuse condemned by the Fourth Amendment. As I said in Osborn v. United States, 385 U. S. 323, 353: "Such devices lay down a dragnet which indiscriminately sweeps in all conversations within its scope, without regard to the nature of the conversations, or the participants. A warrant authorizing such devices is no different from the general warrants the Fourth Amendment was intended to prohibit."

## APPENDIX TO OPINION OF DOUGLAS, J.

## FEDERAL WIRETAPPING AND BUGGING 1969-1970

Executive Ordered

Minimum Maximum

221.3

200.0

Devices

Court Ordered

Year

1969

1970

Devices .

Minimum

17.5\*

3.4

.3			Days in Use		
		Days in		Minimum	Maximum
Year	Number	Use	Number	(Rounded)	(Rounded)
1969	30	462	94	8,100	20,800
1970	180	2,363	113 .	8,100	22,600
			•		
Ratio of Days Used			Average Days in Use		
Executive Ordered:			Per Device		
Court Ordered		Court Ordered		ve Ordered evices	

Maximum

45.0\*

9.6

\*Ratios for 1969 are less meaningful than those for 1970, since court-ordered surveillance program was in its initial stage in 1969,

Devices

15.4

13.1

Source:
(1) Letter from Assistant Attorney General Robert Mardian to Senator Edward M. Kennedy, March 1, 1971. Source figures withheld at request of Justice Department.

(2) 1969 and 1970 Reports of Administrative Office of U. S. Courts.

# SUPREME COURT OF THE UNITED STATES

No. 70-153

United States, Petitioner,

v.

United States District Court for the Eastern District of Michigan, Southern Division, et al. On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 19, 1972]

Mr. Justice White, concurring in the judgment.

This case arises out of a two-count indictment charging conspiracy to injure and injury to Government property. Count I charged Robert Plamondon and two codefendants with conspiring with a fourth person to injure Government property with dynamite. Count II charged Plamondon alone with dynamiting and injuring Government property in Ann Arbor, Michigan. The defendants moved to compel the United States to disclose, among other things, any logs and records of electronic surveillance directed at them, at unindicted coconspirators, or at any premises of the defendants or coconspirators. They also moved for a hearing to determine whether any electronic surveillance disclosed had tainted the evidence on which the grand jury indictment was based and which the Government intended to use at trial. They asked for dismissal of the indictment if such taint were determined to exist. Opposing the motion, the United States submitted an affidavit of the Attorney General of the United States disclosing that "[t]he defendant Plamondon had participated in conversations which were overheard by Government agents who were monitoring

wiretaps which were being employed to gather intelligence information deemed necessary to protect the Nation from attempts of domestic organizations to attack and subvert the existing structure of the Government," the wiretaps having been expressly approved by the Attorney General. The records of the intercepted conversations and copies of the memorandum reflecting the Attorney General's approval were submitted under seal and solely for the Court's in camera inspection.<sup>1</sup>

As characterized by the District Court, the position of the United States was that the electronic monitoring of Plamondon's conversations without judicial warrant was a lawful exercise of the power of the President to safeguard the national security. The District Court granted the motion of defendants, holding that the President had no constitutional power to employ electronic surveillance without warrant to gather information about domestic organizations. Absent probable cause and judicial authorization, the challenged wiretap infringed Plamondon's Fourth Amendment rights. The court ordered the Government to disclose to defendants the records of the monitored conversations and directed that a hearing be held to determine the existence of taint either in the indictment or in the evidence to be introduced at trial.

The Government's petition for mandamus to require the District Court to vacate its order was denied by the

<sup>&</sup>lt;sup>1</sup> The Attorney General's affidavit concluded:

<sup>&</sup>quot;I certify that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court in camera. Accordingly, the sealed exhibit referred to herein is being submitted solely for the court's in camera inspection and a copy of the sealed exhibit is not being furnished to the defendants. I would request the court, at the conclusion of its hearing on this matter, to place the sealed exhibit in a sealed envelope and return it to the Department of Justice where it will be retained under seal so that it may be submitted to any appellate court that may review this matter." App. 20-21.

Court of Appeals. 444 F. 2d 651 (1971). That court held that the Fourth Amendment barred warrantless electronic surveillance of domestic organizations even if at the direction of the President. It agreed with the District Court that because the wiretaps involved were therefore constitutionally infirm, the United States must turn over to defendants the records of overheard conversations for the purpose of determining whether the Government's evidence was tainted.

I would affirm the Court of Appeals but on the statutory ground urged by respondent Keith (Brief, p. 115) without reaching or intimating any views with respect to the constitutional issue decided by both the District Court and the Court of Appeals.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, 18 U.S.C. §§ 2510-2520, forbids under pain of criminal penalties and civil actions for damages any wiretapping or eavesdropping not undertaken in accordance with specified procedures for obtaining judicial warrants authorizing the surveillance. Section 2511 (1) establishes a general prohibition against electronic eavesdropping "except as otherwise specifically provided" in the statute. Later sections provide detailed procedures for judicial authorization of official interceptions of oral comunications; when these procedures are followed the interception is not subject to the prohibitions of § 2511 (1). Section 2511 (2), however, specifies other situations in which the general prohibitions of § 2511 (1) do not apply. In addition, § 2511 (3) provides that

"Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U.S.C. § 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potentional attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. tents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power."

It is this subsection that lies at the heart of this case.

The interception here was without judicial warrant, it was not covered by the provisions of § 2511 (2) and it is too clear for argument that it is illegal under § 2511 (1) unless it is saved by § 2511 (3). The majority asserts that § 2511 (3) is a "disclaimer" but not an "exception." But however it is labeled, it is apparent from the face of the section and its legislative history that if this in ception is one of those described in § 2511 (3), it is not reached by the statutory ban on unwarranted electronic eavesdropping.<sup>2</sup>

<sup>&</sup>lt;sup>2</sup> I cannot agree with the majority's analysis of the import of § 2511 (3). Surely, Congress meant at least that if a court determined that in the specified circumstances the President could constitutionally intercept communications without a warrant, the general ban of § 2511 (1) would not apply. But the limitation on the applicability of § 2511 (1) was not open-ended; it was confined to those situations which § 2511 (3) specifically described. Thus, even assuming the constitutionality of a warrantless surveil-

The defendants in the District Court moved for the production of the loss of any electronic surveillance to which they might have been subjected. The Government responded that conversations of Plamondon had been intercepted but took the position that turnover of surveillance records was not necessary because the interception complied with the law: Clearly, for the Government to prevail it was necessary to demonstrate first that the interception involved was not subject to the statutory requirement of judicial approval for wiretapping because the surveillance was within the scope of § 2511 (3); and, secondly, if the Act did not forbid the warrantless wiretap, that the surveillance was consistent with the Fourth Amendment.

The United States has made no claim in this case that the statute may not constitutionally be applied to the surveillance at issue here.3 Nor has it denied that to

lance authorized by the President to uncover private or official graft forbidden by federal statute, the interception would be illegal under § 2511 (1) because it is not the type of presidential action saved by the Act by the provision of § 2511 (3). As stated in the text and footnote 3, the United States does not claim that Congress is powerless to require warrants for surveillances which the President otherwise would not be barred by the Fourth Amendment from undertaking without a warrant.

<sup>3</sup> See the Transcript of Oral Argument in this Court, pp.13-14:

"Q. . . . I take it from your answer that Congress could forbid the President from doing what you suggest he has the power to do in this case?

"Mr. Mardian [Assistant Attorney General]: That issue is not before this Court-

"Q. Well, I would-my next question will suggest that it is. Would you say, though, that Gangress could forbid the President?

"Mr. Mardian: I think under the rule announced by this court in Colony Catering that within certain limits the Congress could severely restrict the power of the President in this area.

"Q. Well, let's assume Congress says, then, that the Attorney General, or the President may authorize the Attorney General in specific situations to carry out electronic surveillance if the Attorney

comply with the Act the surveillance must either be supported by a warrant or fall within the bounds of the exceptions provided by § 2511 (3). Nevertheless, as I read the opinions of the District Court and the Court of Appeals, neither court stopped to inquire whether the challenged interception was illegal under the statute but proprotected directly to the constitutional issue without adverting to the time-honored rule that courts should abjure constitutional issues except where necessary to decision of the case before them. Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 346-347 (1936) (conacurring opinion). Because I conclude that on the record before us the surveillance undertaken by the Government in this case was illegal under the statute itself, I find it unnessary, and therefore improper, to consider or decide the constitutional questions which the courts below improvidently reached.

The threshold statutory question is simply put: Was the electronic surveillance undertaken by the Govern-

General certifies that there is a clear and present danger to the security of the United States?

"Mr. Mardian: I think that Congress has already provided that,

"Q. Well, would you say that Congress would have the power to limit surveillances to situations where those conditions were satisfied?

"Mr. Mardian: Yes, I would—I would concur in that, Your Honor."

A colloquy appearing in the debates on the bill, appearing at Cong. Rec. Vol. 114, Pt. 11, pp. 14,750-14,751, indicates that some Senators considered § 2511 (3) as merely stating an intention not to interfere with the constitutional powers which the President might otherwise have to engage in warrantless electronic surveillance. But the Department of Justice, it was said, participated in the drafting of § 2511 (3) and there is no indication in the legislative history that there was any claim or thought that the supposed powers of the President reached beyond those described in the section. In any case, it seems clear that the congressional policy of noninterference was limited to the terms of § 2511 (3).

ment in this case a measure deemed necessary by the President to implement either the first or second branch of the exception carved out by § 2511 (3) to the general requirement of a warrant?

The answer, it seems to me, must turn on the affidavit of the Attorney General offered by the United States in opposition to defendants' motion to disclose surveillance records. It is apparent that there is nothing whatsoever in this affidavit suggesting that the surveillance was undertaken within the first branch of the § 2511 (3) exception, that is, to protect against foreign attack, to gather foreign intelligence or to protect national security information. The sole assertion was that the monitoring at issue was employed to gather intelligence information "deemed necessary to protect the Nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." App. 20.

Neither can I conclude from this characterization that the wiretap employed here fell within the exception recognized by the second sentence of § 2511 (3); for it utterly fails to assume responsibility for the judgment that Congress demanded: that the surveillance was necessary to prevent overthrow by force or other unlawful means or that there was any other clear and present danger to the structure or existence of the Government. The affidavit speaks only of attempts to attack or subvert; it makes no reference to force or unlawfulness; it articulates no conclusion that the attempts involved any clear and present danger to the existence or structure of the Government.

The shortcomings of the affidavit when measured against § 2511 (3) are patent. Indeed, the United States in oral argument conceded no less. The specific inquiry put to Government counsel was: "[D]o you think the affidavit, standing alone, satisfies the Safe Streets Act?"

The Assistant Attorney General answered "No sir, we do not rely upon the affidavit itself . . . ." Tr. of Oral Arg., p. 15.

Government counsel, however, seek to save their case by reference to the in camera exhibit submitted to the District Court to supplement the Attorney General's affidavit. It is said that the exhibit includes the request for wiretap approval submitted to the Attorney General, that the request asserted the need to avert a clear and present danger to the structure and existence of the Government, and that the Attorney General endorsed his approval on the request. But I am uncon-

Later at oral argument, however, the Government said: "[T]he affidavit was never intended as the basis for justifying the surveillance in question... The justification, and again I suggest that it is only a partial justification, is contained in the in camera exhibit which was submitted to Judge Keith..... We do not rely upon the affidavit itself but the in camera exhibit." Tr. of Oral Arg., at pp. 14-15. And in its reply brief, the Government says flatly: "These [in camera] documents, and not the affidavit, are the proper basis for determining the ground upon which the Attorney General acted." Reply Brief for the United States, p. 9.

See also Transcript of Oral Argument, p. 17:

<sup>&</sup>quot;Q. [I]f all the in camera document contained was what the affidavit contained, it would not comply with the Safe Streets Act?

<sup>&</sup>quot;Mr. Mardian: I would concur in that, Your Honor."

The Government appears to have shifted ground in this respect. In its initial brief to this Court, the Government quoted the Attorney General's affidavit and then said, without qualification, "These were the grounds upon which the Attorney General authorized the surveillance in the present case." Brief for the United States, p. 21. Moreover, counsel for the Government stated at oral argument "that the in camera submission was not intended as a justification for the authorization, but simply [as] a proof of the fact that the authorization had been granted by the Attorney General of the United States, over his own signature." Tr. of Oral Arg., pp. 6-7.

<sup>&</sup>lt;sup>6</sup> Procedures in practice at the time of the request here in issue apparently resulted in the Attorney General merely countersigning

vinced the mere endorsement of the Attorney General on the request for approval submitted to him must be taken as the Attorney General's own opinion that the wiretap was necessary to avert a clear and present danger to the existence or structure of the Government when in an affidavit later filed in court and specifically characterizing the purposes of the interception and at least impliedly the grounds for his prior approval, the Attorney General said only that the tap was undertaken to secure intelligence thought necessary to protect against attempts to attack and subvert the structure of Government. If the Attorney General's approval of the interception is to be given a judicially cognizable meaning different from the meaning he seems to have ascribed to it in his affidavit filed in court, there obviously must be further proceedings in the District Court.

Moreover, I am reluctant myself to proceed in the first instance to examine the in camera material and either sustain or reject the surveillance as a necessary measure to avert the dangers referred to in § 2511 (3). What Congress excepted from the warrant requirement was a surveillance which the President would assume responsibility for deeming an essential measure to protect against clear and present danger. No judge can satisfy this congressional requirement.

Without the necessary threshold determination, the interception is, in my opinion, contrary to the terms of the statute and subject therefore to the prohibition contained in § 2515 against the use of the fruits of the

a request which asserted a need for a wiretap. We are told that under present procedures the Attorney General makes an express written finding of clear and present danger to the structure and existence of the Government before he authorizes a tap. Tr. of Oral Arg., pp. 17-18.

warrantless electronic surveillance as evidence at any trial.

There remain two additional interrelated reasons for not reaching the constitutional issue. First, even if it-were determined that the Attorney General purported to authorize an electronic surveillance for purposes exempt from the general provisions of the Act there would remain the issue whether his discretion was properly authorized. The United States concedes that the act of the Attorney General authorizing a warrantless wiretap is subject to judicial review to some extent, Brief for the United States, pp. 21–23, and it seems improvident to proceed to constitutional questions until it is determined that the Act itself does not bar the interception here in question.

Second, and again on the assumption that the surveillance here involved fell within the exception provided by § 2511 (3), no constitutional issue need be reached in this case if the fruits of the wiretap were inadmissible on statutory grounds in the criminal proceedings pending against respondent Plamondon. Section 2511 (3) itself states that "[t]he contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." (Emphasis added.) There has

<sup>&</sup>quot;Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefore may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." 18 U. S. C. § 2515.

been no determination by the District Court that it would be reasonable to use the fruits of the wiretap against Plamondon or that it would be necessary to do so to implement the purposes for which the tap was authorized.

My own conclusion, again, is that as long as nonconstitutional, statutory grounds for excluding the evidence or its fruits have not been disposed of it is

improvident to reach the constitutional issue.

I would thus affirm the judgment of the Court of Appeals unless the Court is prepared to reconsider the necessity for an adversary, rather than an in camera, hearing with respect to taint: If in camera proceedings are sufficient and no taint is discerned by the judge, this case is over, whatever the legality of the tap.